81-2215

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioners,

VS.

ELI LILLY AND COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON A. BASS
JACOB LAUFER
I. SCOTT BASS
LAWRENCE H. ROTH
Bass, Ullman & Lustigman
Attorneys for Petitioner
H. L. Moore Drug Exchange
747 Third Avenue
New York, N.Y. 10017
(212) 751-9494

QUESTIONS PRESENTED

1. Whether the "combination or conspiracy" portion of a Sherman Act vertical conspiracy case has become an issue of law requiring direct evidence, by reason of *GTE Sylvania*?

2. Whether a Court of Appeals which reverses a verdict may deprive the verdict winner of a requested opportunity to make a new trial motion in the District Court?

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The parties to the proceedings are those listed in the caption, except that the parent company of petitioner H.L. Moore Drug Exchange is now known as Optel, Inc. instead of Levitt Industries, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
I. Certiorari Should Be Granted Because the Second Circuit Is Erroneously Requiring Direct Evidence in Order to Prove a Vertical Antitrust Conspiracy	13
(1) Lilly's anti-competitive policies and adherence by wholesalers	15
(2) Coercion	20
II. Certiorari Should Be Granted to Determine Whether a Court of Appeals, Upon Setting Aside a Verdict, May Deprive the Verdict Winner of an Opportunity to Make a Motion for a New Trial in the District Court Where:	
(1) The reversal by the Court of Appeals was based upon insufficiency of evidence; and	
(2) The district court excluded evidence which would have strengthened the verdict winner's case and could have provided the margin of difference	22
CONCLUSION	28

TABLE OF AUTHORITIES

	PAGE
Albrecht v. Herald Co., 390 U.S. 145 (1968)	14, 15n
Beech Cinema, Inc., v. Twentieth Century-Fox Film Corp., 622 F. 2d 1106, 1109 (2d Cir. 1980)	21
Borger v. Yamaha International Corp., 625 F. 2d 390 (2d Cir. 1980)	14, 16n
Cernuto, Inc. v. United Cabinet Corp., 595 F. 2d 164, 168 (3d Cir. 1979)	20
Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947)	24, 25
Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	14
Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	5, 13
Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948)	24, 25
Gough v. Rossmoor Corp., 533 F.2d 453 (9th Cir. 1976) *cert. denied*, 429 U.S. 857 (1976)	27
Iacurci v. Lummus Co., 387 U.S. 86 (1967)	26, 27, 28
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 638 F.2d 538 (2d Cir. 1981), *cert. granted*, __U.S.__, 71 L. Ed. 2d 107 (1981) (No. 80-2182, 1981 Term)	5n
Jacobson v. Armstrong Cork Co., 548 F.2d 438 (2d Cir. 1977)	15
Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940)	24
Neely v. Martin K. Eby Constr. Co., Inc., 386 U.S. 317 (1967)	25, 26n, 27, 28
O'Hare v. Merck & Co., 381 F.2d 286 (8th Cir. 1967)	27
Osborn v. Sinclair Refining Co., 286 F.2d 832, 837 (4th Cir. 1960) *cert. denied*, 366 U.S. 963 (1961)	21

PAGE

Phillips v. Crown Central Petroleum Corp., 395 F. Supp. 735, 769 (D. Md. 1975) 21

Pullman Standard v. Swint, 50 U.S.L.W. 4425, 4430 (U.S. April 27, 1982) 27

Schwimmer v. Sony Corporation of America, Dkt. No. 81-7135 (2d Cir. May 3, 1982)..... 4n, 5n, 12n, 14

Simpson v. Union Oil Co., 377 U.S. 13 (1964) 14

Uniroyal, Inc., v. Jetco Auto Service, 461 F. Supp. 350, 355 (S.D.N.Y. 1978) 21

United States v. Generes, 405 U.S. 93 (1972) 27

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 12, 14

Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949) 24, 25

STATUTES

Sherman Act, 15 U.S.C. § 1 2

Rule 50 of the Federal Rules of Civil Procedure 3

OTHER AUTHORITIES

P. Areeda, Antitrust Analysis 553 (2d Ed 1974) 5

Civil Procedure-Federal Rule 50(d)—Disposition of Cases by the Court of Appeals After Granting Judgment Notwithstanding the Verdict, 47 N.C.L. Rev. 162 (1968) 27

Post-Verdict Motions Under Rule 50: Protecting The Verdict Winner, 53 Minn. L. Rev. 358, 374 (1968). 27

L. Sullivan, Antitrust § 109 at 314 (1977) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioners,

vs.

ELI LILLY AND COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The following opinions of the Court of Appeals and of the district court are set forth in the appendices in chronological order:

The opinion of the district court denying Lilly's motion for summary judgment is reported at 1979-1 Trade Cas. [CCH] ¶ 62, 674 (1979) and is set forth in Appendix A.

The opinion of the district court denying Lilly's motion for judgment *n.o.v.* and for a new trial is reported at 1980-2 Trade Cas. [CCH] ¶ 63,300 (1980) and is set forth in Appendix B.

The opinion of the district court granting an injunction against Lilly is reported at 1980-81 Trade Cas. [CCH] ¶ 63,652 (1980) and is set forth in Appendix C.

The opinion of the Court of Appeals reversing the denial by the district court of Lilly's motion for judgment *n.o.v.* and for a new trial is officially reported at 662 F.2d 935 (2d Cir. 1981) and is set forth in Appendix D.

The judgment entered by the Court of Appeals is set forth in Appendix E.

The order denying Moore's petition for rehearing, not officially reported, is set forth in Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 16, 1981. Petitioner filed a petition for rehearing with a suggestion for rehearing *en banc*, which was denied without opinion on December 30, 1981. This Court granted petitioner's two motions for extensions of time in which to file the instant petition. The Orders granting the extensions are dated March 19 and May 7, 1982 and provide for an extension until May 28, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal statutory provisions involved are:

(a) Section 1 of the Sherman Act, 15 U.S.C. § 1, which states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one

hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(b) Rule 50 of the Federal Rules of Civil Procedure, which provides, in relevant part:

> **(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.
>
> **(c) Same: Conditional Rulings on Grant of Motion.** (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order

thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of Motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

At issue in this case is a doctrine[1] which removes from the jury the question of whether there was a vertical "combination or

[1] The Second Circuit recently handed down a decision in *Schwimmer v. Sony Corporation of America*, ___ F.2d ___, Dkt. No. 81-7135 (2d Cir. May 3, 1982), which raises some of the same issues. The *Sony* decision is appended to petitioner's motion for an Extension of Time In Which To File Petition For Certiorari in the instant case. A petition for *certiorari* will be filed in that case as well. Petitioner has filed a Motion for Deferral of Consideration in order to have both petitions considered jointly.

conspiracy" in Sherman Act Section 1 cases. Apparently relying upon its interpretation of this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[2] the Second Circuit has made that threshold issue a legal one which must be established by direct evidence. This reading leaves the reasonableness of the restraint as the factual issue for the jury.

What the Second Circuit did in this case is yet another in a series of recent decisions in which that court has assumed the position of fact-finder in order to reach a desired legal result.[3] In substituting its judgment for that of the jury in this case, however, the Court of Appeals has done more than merely ignore the accepted standard of appellate review; the Second Circuit's direct evidence ruling contravenes an established body of antitrust law which, as Professor Areeda has noted, is "[p]erhaps the most litigated issue under the antitrust laws . . ."[4]

The Second Circuit's assumption of the fact-finder's role also brings to bear a decisive inconsistency in the Federal Rules of Civil Procedure. Moore, the verdict winner, never had an opportunity to have the trial judge entertain a new trial motion. This is particularly crucial because the court had excluded direct evidence of the conspiracy. By directing entry of judgement against Moore, the Court of Appeals deprived Moore of the district court's discretion with respect to new trial issues.

• • • • • •

The H.L. Moore Drug Exchange ["Moore"] was an innovator in the wholesale drug field. Moore pioneered the use of a mail order catalogue, enabling it to sell on a nationwide basis. It achieved those nationwide sales because it offered lower prices

---

[2] 433 U.S. 36 (1977)

[3] *See, e.g., Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 638 F.2d 538 (2d. Cir. 1981), *cert. granted*, — U.S. —, 71 L.Ed. 2d 107 (1981) (No. 80-2182, 1981 Term) [another decision by Judge Mansfield which is currently pending before this Court], and *Schwimmer*, note 1 *supra*.

[4] P. Areeda, *Antitrust Analysis* 553 (2d ed. 1974)

than the local wholesalers in whose trading areas Moore sold. In an era of little price competition and enforced Fair Trade, Moore was the first wholesaler to discount prices on major pharmaceutical products.

Moore is a full-line wholesaler, which means that it must offer all of the top pharmaceutical lines in order to retain its customers. Lilly is the foremost manufacturer of pharmaceutical products in the United States, offering essential medications such as Darvon®, Keflex®, and other top-selling items. Since the 1950's, Moore has fought an uphill battle in order to obtain directly from Lilly the pharmaceutical products which it requires.

Lilly refused to sell to Moore from the outset, as did most major manufacturers. Lilly's stated reason then was that it did not sell to wholesalers who did not belong to the National Wholesale Druggists Association ["NWDA"]. This was a "Catch-22" excuse, for the NWDA refused to accept Moore because it was not a direct account of manufacturers such as Lilly.

For years Moore obtained the necessary Lilly line from other wholesalers. By the mid-196[illegible], however, Moore noticed that a number of its suppliers discontinued sales to Moore of major manufacturers' products. Moore discovered that Lilly had obtained the identities of Moore's suppliers, who thereafter refused to sell to him.

In 1966, Moore sued Lilly and the other manufacturers, alleging an antitrust conspiracy among those who cut off sales to Moore. The evidence revealed that a number of the companies had hired a spy in order to ascertain who was selling to Moore. The spy supplied manufacturers, including Lilly, with the identity of Moore's sources of supply. Lilly was one of the companies which paid for the reports.[5]

---

[5] The foregoing evidence as to the spy was excluded by the district court. This exclusion forms part of petitioner's argument in Part II, *infra*, as to why a remand was proper in this case.

Moore and Lilly settled the case in 1971. Lilly agreed to sell to Moore as part of that settlement.

Lilly's begrudging agreement to franchise Moore immediately met with complaints from other wholesalers who did not sell at prices as low as Moore's. Indeed, they could not, for as Lilly's principal witness (Robert Manning) testified, if all wholesalers discounted it would "probably cause the bankruptcy of a lot of wholesalers." Manning acknowledged that because of Moore, there had been "some economic bruising taking place." [Appendix D at p. A74]

And that was precisely what occurred. A particularly vigorous source of the complaints was the D.A. Rosow Company. Rosow told Lilly he was upset about having Moore franchised in "his" trading area, about Moore's marketing methods ("What's Lilly going to do about it?"), and about other of Moore's practices. The source of Rosow's annoyance was, however, best described by Harold Katz, the Lilly salesman in charge of the region: "I think price was always involved."

Mr. Katz later admitted to Moore that Moore was a "thorn in the side of Lilly, that they get all sorts of complaints about [Moore], . . . and [Katz] gets a lot of blame for it because merchandise he [Moore] is selling . . . in New Britain, Connecticut goes out of the State."[6]

While Moore was a franchised Lilly wholesaler, it was required to go along with two Lilly policies which restricted resale of Lilly's products. The first was Lilly's "Special Deals." These were promotional offers involving some of Lilly's most important products, such as Penicillin V® and Darvon®. The "Special Deals" provided a large discount and long payment terms. Special Deal merchandise accounted for a huge percentage of Lilly wholesalers' annual purchases. Any wholesaler without the discounted merchandise was thus unable to compete for a major share of retail business.

---

[6] This crucial evidence was excluded by the trial court "for the time being." Because of Rule 50(d) F.R.Civ.P., Moore never had the opportunity to have that evidence considered. *See* Part II of this Petition and footnote 5, *supra*.

Lilly explicitly refused to sell Special Deal merchandise to a wholesaler if the wholesaler sold to "*non*-Lilly wholesalers or any firm which resells to other dealers." [Appendix A, p. A17]. Lilly had few, if any, wholesalers serving the same local area. Lilly was thus preventing wholesalers such as Moore from selling large-volume merchandise to wholesalers in other territories (who could in turn compete with local Lilly wholesalers). When Moore did not comply with this anti-competitive policy (to which all of Lilly's wholesalers had to adhere), Moore was denied the important discounts and payment terms on those products.

A second anti-competitive program was Lilly's "non-affiliation policy." All Lilly wholesalers had to agree in writing to this policy, which stated that Lilly would not sell to wholesalers affiliated with retail pharmacies. The rationale for the policy was that "wholesalers would act as retailers in making their purchasing decisions." The program was intended to prevent wholesalers from selling to retail accounts at too low a price. Lilly forced its wholesalers to agree to this policy in order to maintain further control over the prices at which its products were resold. Moore was allegedly terminated pursuant to this policy.

Moore ran afoul of more than these two anticompetitive policies. At one point, Moore began to advertise lower-priced generic drugs in its catalog. Lilly's district manager and sales representatives told Moore that Lilly was unhappy with pages listing Lilly's products and prices next to comparable generic products. Lilly asked him to stop. Lilly was the only manufacturer ever to make such a request of Moore. Again, Moore had to comply unwillingly in order to retain the Lilly line.

There was no hiding Lilly's dislike for Moore. It was Moore's claim that Lilly was waiting to find an excuse to terminate Moore, but one which was not on its face subject to legal exposure a second time. This theory is well-documented by the following hand-written memorandum sent by Harold Katz, the Lilly salesman in Moore's region, just a couple of years after Lilly took Moore on (After D. A. Rosow, a competing wholesaler, had submitted information to Katz):

> "Coincidentally, some of the information is what we were looking for several weeks ago. His motivation for leaving this with me? I'm sure he knows I'll send it along and subsequently another nail in H.L.M.'s box!!"

The memorandum travelled from the salesman to the Boston District Manager. From there, it was forwarded to the Eastern Region Assistant Sales Director. The memorandum ended up in Indianapolis in the hands of Robert Manning, who was in charge of all wholesaler accounts. Manning himself testified "... that only 'important' information would go up the ladder in this manner."

Then, in November, 1975, at a meeting of the National Wholesale Druggist Association, Moore became a topic of several Lilly-wholesaler conversations. Moore's parent company had purchased several Mall Drug Stores in 1974. There were a number of wholesalers at the NWDA meeting who anxiously brought Moore's affiliation to Lilly's attention. The evidence established beyond doubt that Lilly knew about the affiliation prior to the NWDA meeting. Lilly nonetheless thereafter agreed to a private meeting with Spectro Industries, a Moore competitor located in another territory. The meeting was held in Lilly's hotel suite in Acapulco, and was attended by Lilly's president and senior officers as well as the chief executives of Spectro.

The subject of Moore was the primary purpose of the meeting. Spectro asked Lilly point-blank if it was going to do something about Moore. Lilly agreed to "investigate," despite the fact that it had already learned of the affiliation earlier.

The jury heard the evasive testimony of Lilly's president, who said that he could not recall anything about his own decision to terminate Moore within weeks thereafter and that he could not say whether complaints from wholesalers about Moore selling at a lower price was a factor he took into account.

Nor could the three Lilly witnesses who testified about the Spectro meeting get their stories straight:

(a) Lilly's president acknowledged that Moore was discussed but claimed that the meeting took place openly over lunch rather than in a hotel suite.

(b) Mr. Manning testified, to the contrary, that the meeting was held in a private suite at the request of Spectro, in order to discuss Moore.

(c) Mr. Garde, Spectro's President, testified that he does not recall if Moore's name was ever even mentioned.

It was one month later that Lilly decided to terminate Moore. The jury properly found that the excuse Lilly immediately seized upon—the non-affiliation policy—was a pretext. The termination was effective as of June, 1976.

Moore filed this lawsuit that spring, alleging, *inter alia*, a violation of Section 1 of the Sherman Act[7], seeking damages and injunctive relief. The jurisdictional bases for the claim were Section 4 of the Clayton Act, 15 U.S.C. §§ 15 and 26 and 28 U.S.C. §§ 1331 and 1337.

The parties entered into a Consent Order pursuant to which Lilly sold to Moore on a C.O.D. basis pending the outcome of the trial.

Lilly moved for summary judgment, which was denied by Judge Sweet on the grounds that the evidence provided a sufficient inference of conspiracy. [Appendix A]. The case was then tried to a jury, which returned a special verdict in Moore's favor. The jury found that Lilly had conspired with its wholesalers to control resale prices and to restrict the territories in which Lilly products could be sold, and it awarded Moore $64,000.00 in damages.

A major portion of the trial was devoted to Moore's proof that the non-affiliation policy was merely a pretext for the termination, and that the termination actually resulted from Lilly's and

[7] Moore's other claims were either dismissed or withdrawn.

its wholesalers' long-standing desire to rid themselves of Moore.[8] Moore's termination was thus found by the jury to have occurred in furtherance of the illegal conspiracy.

Lilly moved for judgment *n.o.v.* or for a new trial on a number of grounds, including the sufficiency of the conspiracy evidence. Judge Sweet denied the motion, properly deferring to the jury's findings. [Appendix B].

The trial court later held a hearing relating to Moore's request for an injunction. At that hearing, Lilly's President testified that Lilly still would refuse to deal with Moore. He used the non-affiliation policy as the excuse. Moore was granted an injunction requiring Lilly to sell to Moore for one year. The injunction additionally prohibited a cessation of dealings for three years based upon any retaliatory reasons or for any reason violating the antitrust laws. [Appendix C]. Final judgment was entered on January 28, 1981.

Lilly appealed from the judgment and injunction. The Second Circuit reversed, directing entry of judgment for Lilly. [Appendix D]. Instead of dealing with the conspiracy that the jury found, the Court spent most of the opinion explaining why it did not believe Moore's evidence proved a general conspiracy. The Court devoted a summary half-page treatment [Appendix D, p.A96] to the real claim upon which Moore prevailed: a Lilly scheme to restrict resale prices and territories to which the other

---

[8] As the District Court found:

"A considerable part of the proof at trial related to Lilly's non-affiliation policy. Briefly stated, Lilly asserted that it would not sell its products to any wholesaler affiliated with a retail pharmacy, claiming that this prohibition was necessary to maintain the integrity of the distribution process. Plaintiff vigorously contested this assertion and sought to establish that the non-affiliation policy was a sham, at least as it applied to Moore in these circumstances. Although Lilly had notified its wholesalers of its policy by a letter dated October 23, 1973, there was sufficient evidence to support plaintiff's view of the non-affiliation policy, since the testimony revealed that this 'policy' was not stringently enforced against other 'violators' such as Rogers Wholesale Drugs (Tr. 68, 217-20, 259, 482-85); Kiefer-Stewart Company (Tr. 68, 225, 479-82); and Kaufman-Lattimer Co. (Tr. 214-17, 486-95). Although Lilly offered explanations for each of these 'exceptions' to the rule, they need not have been credited by the jury." [Appendix B, p. A30].

wholesalers adhered, and pursuant to which Lilly coerced Moore (through the Special Deals, the visit to stop generic drug advertising, and the termination itself)—*i.e.*, a conspiracy recognized by this Court in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) and in subsequent decisions. In its one paragraph discussion of the evidence, the Second Circuit ignored much of Moore's proof and permitted no inferences.

The Court of Appeals based a major part of its decision on Lilly's Mr. Manning, testimony which was contradicted by reasonable inferences drawn by the trial judge and jury alike.[9] It also held that the record was "devoid" of proof of any anti-competitive policy. The Opinion ignored in its discussion of the conspiracy evidence two of the factors upon which the trial judge stated he relied: the turbulent twenty-year history of Lilly's refusals to deal with Moore and the effect of Moore's prices on other wholesalers. The undeniable impact of the nail-in-the-box and Spectro evidence was neutralized by the Court.[10] Instead, it required direct proof of an agreement with Spectro or of an agreement to control resale prices.

Moore's petition for rehearing was denied without opinion on December 30, 1981. Moore argued that, with the new direct evidence requirement, it should at least be permitted a remand for the trial court's consideration of a new trial motion. That motion would be based, in part, upon exclusions of direct evidence which Moore did not challenge as the verdict winner. See footnotes 5 and 6, *supra*.

---

[9] For example, the Court finds as a *fact* that the "nail-in-the-box" evidence was "unimportant" because Mr. Manning so stated. Lilly purposely never called the author of the note to testify. [Appendix D, p. A88].

[10] The Court found that:

"[T]he 'nail-in-the-box' memorandum . . . had [nothing] to do with prices and territories . . ." [Appendix D, p. A98].

This gives Lilly the benefit of all inferences. It is surprising that the Opinion fails to mention Mr. Katz' (the author of the note) testimony that " . . . price was *always* involved" in Rosow's complaints (A342) [emphasis added]. Moreover, Rosow told Lilly that he was upset about having Moore in "his" trading area [A334]. At oral argument, the Court wrote off this evidence by asking:

"They told all their seventeen hundred salesmen to go looking for nails?" [Transcript of Oral Argument, p.30].

Because of the inconsistencies in procedure under Rule 50(d) of the Federal Rules of Civil Procedure, Moore, as a verdict winner, was unable to obtain a remand. This petition requests a ruling that verdict winners are entitled to the same opportunity for a hearing by the trial court as that afforded verdict losers.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision draws into conflict two statutory issues which should be resolved by this Court. The first is whether a plaintiff must have direct evidence of a "contract, combination or conspiracy" in order to prove a vertical Sherman Act conspiracy. The second issue arises from an apparent ambiguity in this Court's interpretation of Rule 50 of the Federal Rules of Civil Procedure. Because of that ambiguity, verdict winners who are reversed on appeal are afforded less protection than verdict losers in terms of the right to have the trial judge consider a new trial motion.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT IS ERRONEOUSLY REQUIRING DIRECT EVIDENCE IN ORDER TO PROVE A VERTICAL ANTITRUST CONSPIRACY

This case squarely presents an issue which underlies many Sherman Act Section 1 decisions since 1977, the year in which this Court handed down its decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* That decision involved a contractual provision which constituted the "contract, combination or conspiracy." The opinion was devoted in large part to how courts should analyze the reasonableness of vertical conspiracies. The Second Circuit has apparently read the decision to require a focus on the latter inquiry. It has ruled out circumstantial

evidence in proving the "conspiracy" in such cases, leaving for the jury the factual question of reasonableness.[11] This has effectively turned the "combination or conspiracy" issue into a legal one, requiring direct evidence (*e.g.*, in the form of a contract) for that part of the proof.

The Second Circuit's treatment of conspiracy evidence flatly contradicts the teaching of this Court, which firmly established that proof of a vertical "combination or conspiracy" could be in the form of circumstantial evidence. *See* L. SULLIVAN, ANTITRUST § 109 at 314 (1977). As part and parcel of that trend, the lower courts were instructed to look beyond isolated facts to the "mosaic" of inferences that conspiracy proof often requires. *Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

This standard has been particularly important in the context of vertical conspiracy cases of the type found in *United States* v. *Parke, Davis & Co.*,[12] *Simpson* v. *Union Oil Co.*,[13] and *Albrecht* v. *Herald Co.*[14] These cases held that an anticompetitive policy (such as imposing minimum resale prices) could rise to the level of a prohibited combination if plaintiff proved a "course of dealing" adhered to by most of the manufacturer's customers, and some coercion related thereto. Professor Sullivan has summarized these cases as follows:

> "[I]f the manufacturer receives reports from retailers about the pricing policies of others and implies to them that it will take appropriate action, it will have done 'something more' than merely to announce its policy and then refuse to deal." L. SULLIVAN, *Antitrust* § 139 at 395.

The Second Circuit says that none of the foregoing elements is present in this case. Its analysis is found on page 945 of the

---

[11] *See also Schwimmer* v. *Sony Corp. of America, supra.*

[12] 362 U.S. 29 (1960).

[13] 377 U.S. 13 (1964).

[14] 390 U.S. 145 (1968). In *Albrecht*, the Court even suggested that a conspiracy could be proven merely by establishing that plaintiff unwillingly complied with a manufacturer's anticompetitive policy. 390 U.S. at 150 n.6.

decision [Appendix D, p. A97]. That Court did not always decide this way. In early 1977, just before *GTE Sylvania*, the Second Circuit upheld, in *Jacobson* v. *Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977), the granting of a preliminary injunction against termination of a distributor where the evidence was of: (a) customer complaints about plaintiff's presence in another territory; (b) an interoffice memo discussing the complaints; and (c) plaintiff's termination closely following complaints by two other distributors.

GTE Sylvania intervened and the standards changed.[15] In the instant case, Moore presented evidence similar to that adduced by Jacobson: complaints; a termination closely following complaints; an interoffice memo discussing the complaints; a pattern of conduct showing the manufacturer's policy of preventing extra-territorial sales (or heavy discounting); and a defense of "adequate distribution." In the *Moore* case, there was the added proof of the anti-competitive Special Deal and non-affiliation policies to which all distributors adhered.

The Second Circuit nonetheless reached the *opposite* result in *Moore*. It found "the record devoid of proof" (Appendix D, at p. A97) on coercion, price and territorial restraints. That is because it did not look for inferences. The only explanation for this machine-gun rejection of Moore's proof is that the Second Circuit decided that the conspiracy evidence had to be direct [*Id*].

(1) Lilly's Anti-competitive Policies and Adherence by Wholesalers

(a) The Opinion

"THERE IS NO EVIDENCE THAT EITHER THE "NAIL-IN-THE-BOX" MEMORANDUM OR THE SPECTRO MEETING HAD ANYTHING TO DO WITH PRICES AND TERRITORIES."

"ACCORDING TO MR. MANNING, WHILE THE ARTICLE MAY HAVE BEEN IMPORTANT, THE ATTACHED MEMORANDUM WAS 'UNIMPORTANT.'"

---

[15] *See, e.g., Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390 (2d. Cir. 1980).

"THE KATZ MEMORANDUM WAS NO MORE THAN A CASUAL, HAND-WRITTEN NOTE BY ONE OF OVER 1,200 LILLY SALESMAN . . . THE IMPORTANT ITEM WAS THE ARTICLE . . ." [Appendix D, pp. A88, 98].

The Facts

These crucial pieces of evidence have everything to do with prices and territories. Moore's competitive sales practices were the reason both occurred. The written memorandum was clearly the important document which Mr. Manning saw—Lilly already knew about what was in the attached article. The memorandum was a "smoking gun" which the court should have acknowledged. Instead, Judge Mansfield just accepted Lilly's officer's testimony as a definitive fact, removing all inferences and credibility judgments from the jury.

The Court insists that the note reflects Rosow's motives. But Lilly's failure to call Mr. Katz (the author of the note) as a witness leaves a single inference—that the motive belongs to Lilly. This evidence proved that Rosow was "reporting a violation" of Lilly's anticompetitive policies; that Rosow had obtained responses from Lilly before; and that Lilly was continually looking for a viable termination pretext in order to get rid of the "thorn" in Lilly's side.[18]

A final aspect of the "nail-in-the-box" bears noting. The article attached to that memorandum dealt with Moore's affilia-

---

[18] The Second Circuit nonetheless chose to neutralize the evidence altogether:

"[T]here is no connection between the events in 1974 and Lilly's termination of Moore two years later." [Appendix D, p. A94].

In other words, the Second Circuit adopts the false premise that Moore is trying to prove with this evidence that there was a conspiracy in 1974 to eliminate Moore that did not work until 1976. The truth is that the conspiracy was one by Lilly to impose vertical resale restrictions on prices and territories, to which its wholesalers adhered. Moore did not adhere, so Lilly used coercion (the Special Deal refusals, the visit concerning price advertising, and ultimately the termination) to obtain compliance. The "nail-in-the-box" shows that the other wholesalers were performing their "reporting" functions and that Lilly was looking for ways beyond the Special Deals to coerce Moore's adherence.

tion with Parkway. Lilly knew of this affiliation at the time it franchised Moore, both because it appeared in Moore's annual reports and because Parkway was the signatory to Moore's distribution agreement. Lilly never objected to this affiliation. The Second Circuit inexplicably found on this issue that:

> "Parkway's ownership of the Big L stores was *not known to Mr. Manning*, the Lilly executive in charge of wholesale relations, until late 1973 or early 1974."

This is, of course, irrelevant to *Lilly's* knowledge or to the obvious inference the jury was entitled to believe—*i.e.*, that Lilly did not have a concern about affiliations at all. The real concern was Moore's prices.

Spectro

As with the "nail-in-the-box," the Second Circuit neutralized this evidence by concluding that:

> "There is no evidence of any agreement at the meeting relating in any way to Moore's termination . . ." [Appendix D, p. A67].

No such agreement was necessary in order to support the jury's Section 1 verdict.

The jury could reasonably infer that this meeting was held to report the problem of Moore, and that Lilly responded. The trial judge himself so found [Appendix B, p. A39.] It is crucial to note, as the district court did, that this evidence was not utilized to prove that Lilly and Spectro conspired to terminate Moore [*id.*]. Rather, this evidence permitted the jury to infer that other wholesalers complained about Moore because of Moore's violation of the anticompetitive Lilly policies. That inference is hardly "speculative," since Lilly conceded that it was met by a number of wholesalers with comments about Moore. It is also a reasonable inference because Moore would have been of little concern to the other wholesalers were it not for the fact that Moore competed in those wholesalers' territories (and necessarily charged lower prices than the local wholesaler).

The most that the Second Circuit could say was that the inconsistencies among Lilly's witnesses' version of the meeting were "understandable."

(b) The Opinion:

> MOST LILLY WHOLESALERS SELL WITHIN A LOCAL AREA ONLY BECAUSE OF NATURAL LIMITATIONS ON THE SERVICES THEY CAN PROVIDE.

The Facts

The Special Deal was not a natural limitation. Lilly had the great majority of its wholesalers in territories insulated from competition. That was the reason for the complaints due to Moore's sales in other territories. This explains why Moore was a "thorn in Lilly's side" (page 7, *supra*), a fact communicated to Moore by Lilly itself. That is also the reason that Rosow felt angered that Lilly franchised Moore in Rosow's "trading area." The Court again rejected all of Moore's testimony and all of the inferences in Moore's favor.[17]

(c) The Opinion

> MOORE'S CLAIM THAT LILLY HAD POLICIES RESTRAINING RESALE PRICES AND TERRITORIES WAS "SPECULATION." [Appendix D, AT p. A81].

---

[17] The Court also ignored the fact that Lilly could monitor its wholesalers' sales. The Special Deals required the wholesalers to report to Lilly the ultimate retail purchaser before credit was given. By obtaining the wholesaler's invoices, Lilly monitored the type of customers and prices at which the special merchandise was sold. Lilly also had means beyond the Special Deals to monitor where wholesalers resold Lilly products. Few wholesalers other than Moore sold outside of their territory. Lilly had records of its sales to wholesalers in each territory. By virtue of the Distribution Data service, Lilly also had a record of *all* Lilly retail sales made in each territory by zip code. It was consequently not difficult for Lilly to ascertain from the foregoing information (combined with local sales representatives' reports and Special Deal reports) the source of inter-regional sales. This testimony comes from Jerald Rome, a Moore officer, and should have been credited by the Court.

The Facts

Moore did not claim that it "speculated" as to those policies. This characterization by the Court assumes its conclusion before the evidence is even discussed. The Special Deals are not "speculation"; they constitute documentary proof of Lilly's resale price and territorial restrictions. The Special Deals expressly prohibited transshipping by Lilly wholesalers to other wholesalers and, as Lilly's Mr. Katz testified, the purpose was to prevent "unfair competition" caused by lower prices. This was a policy signed by all wholesalers. This was a major part of the evidence upon which Judge Sweet relied. The Second Circuit never discusses this as proof going to the conspiracy.

Lilly's twenty-year refusal to deal with Moore and the attendant supplier cut-offs are far from "speculation." But the Second Circuit fails even to acknowledge this evidence in its conspiracy discussion. What is more, the Second Circuit opinion flatly states as a finding of fact that Lilly's earlier refusal to sell was based upon *Lilly's* proffered reasons. [Appendix D, p. A60]

The non-affiliation policy is not speculation. The jury found that Lilly was not really concerned with such affiliations, and that the policy was a pretext for Lilly's real reason. That reason is what Lilly admitted—that the policy served to prevent lower resale prices to affiliated retailers. Lilly's price tampering is anti-competitive. This policy was signed and adhered to by all wholesalers.

The opinion claims "speculation" because there was evidence that "the majority of Lilly items were being sold by Lilly wholesalers below the suggested retail prices." That was Lilly's testimony. There was also evidence that other wholesalers sold at prices higher (and therefore closer to the suggested price) than did Moore; that Lilly considered it "unusual for anything except a slow-moving item not to be sold at a suggested price"; that resale prices were published with the expectation that they could be followed; that other manufacturers do not use suggested resale prices; that other wholesalers have been subjected to "economic bruising" because of Moore's lower prices; and

that if there were an increase in discounting competition caused by wider distribution of the Lilly line, it "would probably cause the bankruptcy of a lot of wholesalers." The fact that net resale prices were not precisely adhered to does not vitiate the value of this evidence. *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979).

Thus, while the opinion states that "there was testimony disputing the claim that Moore's prices were the lowest," on a motion for judgment *n.o.v.* that type of credibility finding is properly one that should have gone to the jury. The Second Circuit exceeded the scope of its appellate review function.

(2) Coercion

(a) The Opinion

"... THE RECORD IS DEVOID OF PROOF THAT LILLY SOUGHT TO ENFORCE THESE PRICES THROUGH ACTIVE COERCION OR ANY OTHER MEANS."

"... NO EVIDENCE OF ACTUAL OR THREATENED TERMINATION" [Appendix D, at p. A97].

The Facts

There were twenty years of coercion. Judge Mansfield makes not a single mention of the prior dealings, of the cut-off of Moore's suppliers, or of the repeated false excuses Lilly used in its refusal to sell to Moore.

Most startling, however, is the ability of the court to ignore the termination itself. Moore was coerced when it was terminated. Lilly's furnishing of a false reason provided a very important inference for the jury: that Lilly did not want to let Moore know the real reason it was terminated, and that the real reason was one that Lilly had to hide.

> "Thus, because the jury was entitled to reject Fox's proffered explanations of its conduct the jury could also conclude that it would be irrational for Fox to completely refrain from licensing its films to plaintiffs unless it received some hidden benefit from doing so."

Beech Cinema, Inc. v. *Twentieth Century-Fox Film Corp.*, 622 F.2d 1106, 1109 (2d Cir. 1980).

As in *Beech Cinema*, the jury here was entitled to disbelieve Lilly's proffered reason for its conduct. Lilly voiced concern that if all wholesalers discounted as heavily as did Moore, "it would probably cause the bankruptcy of a lot of wholesalers" with a resultant destruction of Lilly's distribution system. By eliminating Moore, the major nationwide discounter, the hidden benefit to Lilly was the maintenance of trading areas for its wholesalers which were insulated from serious price competition.

Nor did the jury have to find that Lilly's unlawful motive was the sole motive for the termination, as long as that motive substantially contributed to the termination. *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 837 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); *Untroyal, Inc.* v. *Jetco Auto Service*, 461 F.Supp. 350, 355 (S.D.N.Y. 1978); *Phillips* v. *Crown Central Petroleum Corp.*, 395 F.Supp. 735, 769 (D.Md. 1975). The jury was fully entitled to infer that Lilly's false reason was another in a series of pretexts used to avoid Moore's national, deep-discount sales.[18]

---

[18] Supporting these inferences are the following facts:

(a) Moore was the *only* wholesaler ever terminated under this 84-year old "policy";

(b) At or about the time Moore became a Lilly wholesaler, Moore was affiliated with Northeast Medical Supply Company, a large-volume retail pharmacy. Lilly knew of this affiliation but never objected. Northeast Medical Supply Co. was later sold to Newman Wholesale Drug. Lilly then conceded that Northeast was a "violative" affiliation, for in the midst of the trial Mr. Manning called Newman to advise them that they would be terminated unless Northeast was divested.

(c) Lilly knew that Moore was affiliated with the Big L stores and did nothing about the affiliation since 1971.

The Second Circuit accepted Lilly's explanation, and denied Moore all inferences:

"Mr. Manning testified that this brief reference made no impression on him at the time and that as a result Lilly never made a determination whether the Northeast affiliation violated Lilly's policy. Thus, with respect to both the Big L and the Northeast affiliations, Lilly did not understand Moore then to be in violation of the non-affiliation policy."

"Manning . . . testified that he completely overlooked the Northeast affiliation as a possible violation of Lilly's policy." [Appendix D, pp. A64, 93].

The jury was also entitled to find coercion by virtue of the consequences of Moore's alleged violation of the nonaffiliation policy. That policy was used to control prices. Whether it was the real reason or not, the termination was coercive.

Moore was similarly coerced when it was unable to obtain Special Deal merchandise.

Moore was coerced when Lilly's district manager and salesman paid Moore a visit to inform him that it "made Eli very unhappy" when Moore advertised lower-priced generic drugs in its catalog near the higher-priced Lilly items. Lilly explicitly asked Moore to stop this practice, which Moore did.

The Second Circuit has refused to accept any inferences and has chosen to ignore the evidence conflicting with Mr. Manning's testimony. Lilly had anticompetitive policies to which its wholesalers adhered. Lilly coerced Moore in several respects. The absence of direct evidence of the "combination" should not have taken the verdict from Moore.

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A COURT OF APPEALS, UPON SETTING ASIDE A VERDICT, MAY DEPRIVE THE VERDICT WINNER OF AN OPPORTUNITY TO MAKE A MOTION FOR A NEW TRIAL IN THE DISTRICT COURT WHERE:

1) **the reversal by the Court of Appeals was based upon insufficiency of evidence; and**

2) **the district court excluded evidence which would have strengthened the verdict winner's case and could have provided the margin of difference.**

Certiorari is required in order to resolve what appears to be a contradictory series of decisions by this Court. The contradiction has left in doubt the right of a verdict winner to make a motion

for a new trial in the district court after his verdict has been set aside by a Court of Appeals. Rule 50(c) of the Federal Rules of Civil Procedure authorizes a verdict winner to make a motion for a new trial as a matter of right in the district court, if the district court grants the other party's motion for judgment notwithstanding the verdict. Similarly, under Rule 50(b), the verdict loser has the same right to a hearing in the district court. But in this case, where the verdict was set aside on appeal, the verdict winner was deprived by the Court of Appeals of an opportunity to make the same motion in the district court.

This result is both illogical and unfair. Moore, the prevailing party in the district court, has thus been denied the opportunity to invoke the district court's discretion in determining the new trial question. The verdict loser was, on the other hand, guaranteed that right. In effect, Moore has been penalized for having won the verdict in the first instance.

The district court excluded certain evidence of the conspiracy at trial. There is no doubt that this evidence would have strengthened Moore's case. It is significant that the exclusion came after the court had previously denied summary judgment to Lilly, holding that Moore had enough admissible evidence to raise a question of fact for the jury.

The evidence excluded at trial would have shown that an "industrial spy" working at Moore had reported to Lilly the identities of Moore's secondary (and sole) suppliers of Lilly products.[19] Immediately thereafter, these sources stopped dealing with Moore. [page 6, *supra*]. From this evidence and the surrounding circumstances, the jury could have reasonably inferred that Lilly intended to engage its dealers in its effort to maintain prices and restrict territorial markets.

The other excluded evidence was testimony that even after Lilly reluctantly agreed to sell directly to Moore, it continued to have a common understanding with complaining customers that Moore's discounting and inter-territorial sales were a "thorn" in

---

[19] The district court excluded this evidence on the theory that, although relevant, its prejudice to Lilly outweighed Moore's need for the evidence.

Lilly's side. [page 7, *supra*][20] The district court's exclusion of this evidence was made, at least in part, in light of its summary judgment holding that there was otherwise enough evidence to support a jury inference of conspiracy.

The Second Circuit, however, found that the evidence which did go to the jury was insufficient. Moore's petition for rehearing raised these new trial issues and asked for an opportunity to make a motion for a new trial in the district court. The Second Circuit, in a *pro forma* denial, refused to allow the requested remand.[21] The net result is that the Second Circuit, in applying its evidentiary standard for proof of antitrust conspiracies, has deprived Moore of an opportunity to ask the district court to reconsider whether its earlier exclusionary rulings should be altered in light of the fact that such evidence could have provided the margin of difference.

Under the early decisions of this Court, after the adoption of Rule 50, there would have been no doubt that the result reached by the Second Circuit would have been contrary to law. This Court placed great emphasis on preserving the rights of the verdict winner to make a motion for a new trial in the district court after the verdict is set aside on appeal. *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949); *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571 (1948); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); and *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). The *Cone* Court emphasized that:

> "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. . . . Exercise of this discretion presents to the

---

[20] The court excluded this evidence "for the time being" on theory that it was hearsay, despite the fact that it was uttered by Lilly's salesman who handled Moore's account.

[21] The denial of the petition left intact the Court's direction that judgment be entered dismissing the complaint.

> trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone."
>
> • • • • • •
>
> "Furthermore, [holding otherwise] would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the district court." 330 U.S. at 216, 218 [citations omitted].

The issue which arises in the instant case stems from certain language in this Court's subsequent decision in *Neely* v. *Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317 (1967). The Court held that, where the verdict winner upon reversal failed to ask the Court of Appeals for an opportunity to make a motion for a new trial, the Court of Appeals did not err in its direction that judgment be entered dismissing the complaint.

Although authorizing the Court of Appeals to entertain a request for a remand, 386 U.S. at 329, the Court was careful to emphasize that it was not abandoning its prior rule that the discretionary disposition of new trial issues is one which ordinarily should be resolved at the district court level. Citing with approval the earlier landmark decisions in *Cone*, *Globe Liquor* and *Weade*, Justice White explained:

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. Although many of the plaintiff-appellee's possible grounds for a new trial, such as inadequacy of the verdict, will not survive a decision that the case should not have gone to the jury in the first place, there remain important considerations which may entitle him to a new trial. The erroneous exclusion of evidence which would have strengthened his case is an important possibility." 386 U.S. at 327.
>
> • • • • • •

> "Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert." 386 U.S. at 325.[22]

Neely, however, left unresolved the critical question of whether the Court of Appeals, in circumstances which would otherwise be appropriate for the exercise of the district court's discretion, may itself act upon and deny the request for a new trial on the merits. *Dictum* in Justice White's opinion suggested that may have in fact been what the Court meant:

> "[T]he court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Neely*, 386 U.S. at 329.[23]

The dictum in *Neely*, however, was thrown into doubt only two months later by this Court's *per curiam* decision in *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967). In *Iacurci*, the Court of Appeals set aside the verdict and directed the entry of judgment against the verdict winner. This Court reversed the direction that judgment be entered, holding that the new trial issues in the petition for rehearing in the Court of Appeals compelled a remand to the district court for consideration of a motion for a new trial:

---

[22] The decision has been described as stating "an inclination towards reserving for the discretion of the trial court disposition of those issues more appropriately addressed to it." 5A MOORE'S FEDERAL PRACTICE, ¶ 50.15 at p.50-128 (1982).

[23] The exercise of "informed discretion" by a Court of Appeals in determining the merits of new trial issues is contrary to the traditional rule. Typically, the Court of Appeals' review of the trial court's discretion in ruling on a motion for a new trial is limited by the abuse-of-discretion standard. *See Neely*, 386 U.S. at 338 (Black, J., dissenting).

> "Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers. Fed Rule Civ Proc 50(d). See Neely v. Eby Construction Co. 386 US 317, 18 L ed 2d 75, 87 S Ct 1072; Weade v. Dichmann, Wright & Pugh, Inc., 337 US 801, 93 L ed 1704, 69 S Ct 1326." *Iacurci*, 387 U.S. at 88.

The uncertainty surrounding the meaning of the *Neely* and *Iacurci* decisions should be dispelled by the grant of *certiorari* in this case.

It has been suggested that *Neely* and *Iacurci* are irreconcilable. *See Post-Verdict Motions Under Rule 50: Protecting The Verdict Winner*, 53 Minn. L. Rev. 358, 374 (1968); *Civil Procedure-Federal Rule 50(d)—Disposition of Cases by the Court of Appeals After Granting Judgment Notwithstanding the Verdict*, 47 N.C.L.Rev. 162 (1968). *See also Iacurci*, 387 U.S. at 88-89 (Harlan, J., dissenting).

On the other hand, Justice White, the author of the *Neely* Opinion has emphatically stated, albeit in another context, that *Neely* was fully consistent with the earlier cases which held that the trial court is the most appropriate tribunal to determine a factual new trial motion. *United States* v. *Generes*, 405 U.S. 93 (1972) (White, J., concurring in part, dissenting in relevant part). *Compare Pullman Standard* v. *Swint*, 50 U.S.L.W. 4425, 4430 (U.S. April 27, 1982) (in the context of bench trials); *cf. Gough* v. *Rossmoor Corp.*, 533 F.2d 453 (9th Cir. 1976); *O'Hare* v. *Merck & Co.*, 381 F.2d 286, 293 (8th Cir. 1967) (Lay, J., dissenting).

The Second Circuit appears to have adopted the practice of denying as a matter of course applications for a new trial when raised in petitions for rehearing. The court is, in effect, prohibiting the exercise of discretion by the district court, as required by *Iacurci* and the earlier cases. Petitioner respectfully submits

that an interpretation of *Neely* which allows the Second Circuit to do so is inconsistent with basic notions of procedural fairness.[24]

This Court should, therefore, grant certiorari to resolve definitively this fundamental issue. If *Neely* and *Iacurci* are indeed irreconcilable, the Court should resolve that conflict.

If, on the other hand, *Neely* was not intended as a departure from earlier case law, then certiorari should be granted in order to correct the action taken by the Court of Appeals. In either event, this Court should exercise its supervisory jurisdiction in order to remedy the practice pursuant to which the Courts of Appeal may effectively deny the verdict winner an opportunity to make a motion for a new trial.

CONCLUSION

It is respectfully requested that a writ of certiorari issue to review the judgment of the United States Court of Appeals.

Respectfully submitted,

MILTON A. BASS
JACOB LAUFER
I. SCOTT BASS
LAWRENCE H. ROTH
Bass Ullman & Lustigman
Attorneys for Petitioner
H. L. Moore Drug Exchange

---

[24] Rule 50 evidences a strong intent to preserve the right to invoke the discretion of the district court by any party who feels that he is entitled to a new trial. The procedure sanctioned by the Second Circuit has the result of guaranteeing that right only to the party who loses in the district court and not to the party who in the first instance prevails. Also, the nature of the appellate process is such that presentation of a new trial issue is not likely to be raised by the verdict winner unless and until the appellate court has ruled against him. Unless the Court addresses the issues *sua sponte*, the disfavored petition for rehearing becomes the only practical vehicle for asserting the new trial claim. This places the former verdict winner at a virtually insurmountable tactical disadvantage.

TABLE OF CONTENTS

Page

APPENDIX A - Opinion of the United States District Court for the Southern District of New York, H.L. Moore Drug Exchange, Division of/and Levitt Industries, Inc. v. Eli Lilly and Company, 1979-1 Trade Cas. [CCH] ¶62,674 (S.D.N.Y. 1979) A1

APPENDIX B - Opinion of the United States District Court for the Southern District of New York, H.L. Moore Drug Exchange, Division of/and Levitt Industries, Inc. v. Eli Lilly and Company, 1980-1 Trade Cas. [CCH] ¶63,300 (S.D.N.Y. 1980) A22

APPENDIX C - Opinion of the United States District Court for the Southern District of New York, H.L. Moore Drug Exchange, Division of/and Levitt Industries, Inc. v. Eli Lilly and Company, 1980-81 Trade Cas. [CCH] ¶63,652 (S.D.N.Y. 1980) A46

APPENDIX D - Opinion of the United States Court of Appeals for the Second Circuit, H.L. Moore Drug Exchange, Division of/and Levitt Industries, Inc. v. Eli Lilly and Company, 662 F.2d 935 (2d Cir. 1981) A56

(continued on next page)

TABLE OF CONTENTS (cont'd.)

Page

APPENDIX E - Order of the Court of Appeals for the Second Circuit, H.L. Moore Drug Exchange, Division of/and Levitt Industries, Inc. v. Eli Lilly and Company (2d Cir. Dec. 30, 1981) A101

APPENDIX F - Judgment of the Court of Appeals for the Second Circuit, H.L. Moore Drug Exchange, Division of/and Levitt Industries, Inc. v. Eli Lilly and Company (2d Cir. Jan. 12, 1982) A104

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, H.L. MOORE DRUG EXCHANGE, DIVISION OF/AND LEVITT INDUSTRIES, INC. v. ELI LILLY AND COMPANY, 1979-1 Trade Cas. [CCH] ¶62,674 (S.D.N.Y. 1979)

Opinion

Sweet, D.J.: This is a private action for injunctive relief and treble damages under the anti-trust laws, 15 U.S.C. § 1 et seq., for an alleged violation of Section 1 of the Sherman Act, 15 U.S.C. §1.[1] Plaintiffs are the H.L.

---

[1] 15 U.S.C. § 1 provides, in pertinent part, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal . . ."

Moore's original complaint also included causes of action under Section 2 of the Sherman Act, 15 U.S.C. § 2, proscribing monopolization and attempted monopolization, and Title 42 of the Connecticut Sales and Collections Act, Conn. Gen. Stat. Ann. § 42-133f, which were dismissed by the Honorable Lee Gagliardi by opinion dated May 31, 1978.

Moore Drug Exchange ("Moore"), a Connecticut drug wholesaler, and its parent corporation, Levitt Industries ("Levitt"), of Massachusetts. Levitt owns eight retail pharmacies and a chain of discount health, beauty aid and non-prescription drug stores situated throughout New England. Moore is a wholesaler of pharmaceuticals. Defendant Eli Lilly and Company ("Lilly"), is an Indiana corporation which manufactures and distributes pharmaceuticals.

The court's jurisdiction is grounded in 28 U.S.C. § 1337,[2] and 28 U.S.C. § 1332. Lilly has moved for summary

---

[2] 28 U.S.C. § 1337 provides: "The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

judgment pursuant to Rule 56, F.R. Civ. P. Extensive exhibits, transcripts of depositions and affidavits have been submitted. For the reasons stated below, Lilly's motion is denied.

Lilly distributes its prescription and non-prescription drug products through authorized wholesale distributors only. In 1971, as the result of a settlement agreement in a prior anti-trust proceeding between the parties, Moore became a Lilly-authorized wholesale distributor. Moore sells to retail pharmacies by mail order on a nationwide basis.

In 1975, Moore's parent, Levitt, acquired a chain of eight retail pharmacies in Springfield, Massachusetts (the Mall Drug Stores). Shortly thereafter, Lilly informed Moore that its wholesale distributorship would be terminated pursuant to an internal Lilly "non-affiliation"

policy of not selling to distributors which are "affiliated" with retail pharmacies.[3] This litigation ensued. The crux of the remaining cause of action in the complaint is that the termination was

---

[3] In an October 23, 1973 letter addressed to Lilly Wholesale Distributors, the terms of the policy were expressed in the following manner:

> "The 'wholesaler only' distribution policy is believed by Lilly to be the best way for Lilly to distribute its products. Thus, it will continue to be the policy of the Pharmaceutical Division of Eli Lilly and Company to make direct sales of its products only to selected service wholesalers, the United States Government, the American Red Cross, and manufacturers. It will not sell its products directly to retail pharmacies or hospitals or to wholesalers who directly or indirectly own or control are owned or controlled by, or are under common ownership or control with retail pharmacies. This policy will apply to any Lilly wholesaler who becomes involved with such an ownership or control situation unless the retail pharmacy operations are divested promptly." (Emphasis in Original)

not the result of Moore's alleged violation of the aforementioned policy, but rather the result of an illegal conspiracy between Lilly and certain of its authorized wholesale distributors who competed with Moore for retail orders. The alleged object of the conspiracy, to terminate Moore, resulted from the alleged conspirators' illegal, anti-competitive intent to enforce unreasonable restraints of trade under Section 1 of the Sherman Act,-i.e. the maintenance of territorial restrictions and minimum prices on the resale of Lilly's prescription drug products to retailers. Lilly argues, on the other hand, that the decision to terminate Moore was merely a unilateral refusal to deal in furtherance of a legitimate business policy. Moore counters that the "non-affiliation" policy is a sham.

In deciding this motion this court is

required to view the facts and inferences presented in the light most favorable to Moore, the party opposing the motion. See Modern Home Institute v. Hartford Accident and Indemnity [1975-1 Trade Cases § 60,216], 513 F.2d 102, 111 (2d Cir. 1975), citing United States v. Diebold, Inc. [1962 Trade Cases § 70,322], 369 U.S. 654 (1962) (per curiam). Should Moore place in issue material facts (i) supporting its contention that the non-affiliation policy is a sham, (ii) that there was a conspiracy and (iii) that the conspiracy had an anti-competitive purpose or effect [4] then

---

[4] When the alleged violation of the anti-trust laws consists of a vertical restraint of trade the anticompetitive purpose or effect must be analyzed under the traditional "rule of reason" standard. See Continental T. V., Inc. v. GTE Sylvania, Inc. [1977-1 TRADE CASES § 61,488]. 433 U.S. 36 (1977); National Auto Brokers v. General Motors Corp. [1978-1 TRADE CASES § 61,931], 572 F.2d 953,

(Footnote continued on next page)

summary judgment must be denied. See generally Poller v. Columbia Broadcasting [1962 Trade Cases § 70,228], 368 U.S. 464, 473 (1962) ("Poller"); First National Bank v. Cities Service Co. [1968 Trade Cases § 72,458], 391 U.S. 253, 288-89 (1969); National Auto Brokers v. General Motors Corp. [1978-1 Trade Cases § 61,931], 572 F.2d 953, 960 (2d Cir. 1978) U.S. App. pending; Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co., supra, at 110; Diehl and Sons v. International Harvester [1976-2 Trade Cases § 61,180], 426 F. Supp. 110, 113 (E.D.N.Y. 1976). Also the language of the Supreme Court in Poller should be heeded:

(Footnote continued from preceding page) 960 (2d Cir. 1978). See also Daniel v. All Steel Equipment [1979-1 TRADE CASES § 62,476], 590 F.2d 111, 113 (5th Cir. 1979).

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

368 U.S. at 473.

Material facts are placed in issue when conflicting inferences can be reasonably drawn from largely undisputed facts. See U.S. v. Diebold, supra at 655; Empire Electronics Co. v. U.S., 311 F.2d 175, 180 (2d Cir. 1962); U.S. v. General Motors [1974-2 Trade Cases § 75, 253], 65 F.R.D. 115, 119 (D.D.C. 1974). Here disputed material facts as to all three elements of plaintiff's affirmative case arise from the conflicting inferences that can be drawn undisputed underlying

facts and from the proposed testimony of the participants in the alleged conspiracy.

1. Non-affiliation Policy

Moore contends that the non-affiliation policy has never been enforced in the context of similar affiliations[5] and its application here was only to lend facial credibility to an illegal

---

[5]Alleged instances of non-enforcement include:

> "The status of Jax Drugs, a Lilly wholesaler, as a division of Medicenters, a conglomerate owning hospitals with outpatient pharmacies.
> "The purchasee by Kauffman Lattimer, another Lilly wholesaler, of control interest in two retail pharmacies in 1972.
> "The retention by the APL Corporation, the parent of Rogers Wholesalers, an authorized Lilly wholesaler, of a 25 per cent interest in a number of retail pharmacies.
> "The acquisition by Kiefer, Stewart, a Lilly wholesaler, of retail pharmacies.
> "The stock interests in Drug Guild Distributors, a Lilly wholesaler, held by retail pharmacists, some of whom were also officers of the corporation."

conspiracy aimed at terminating Moore. Although Lilly disputes this contention, offering explanations as to why the policy was applicable in this instance but not in those set forth by Moore,[6] a conflict exists as to its true purpose, the inferences to be drawn from the stated policy and its use in this instance.

2. Conspiracy

Although Moore has sufficiently placed in issue the legitimacy of Lilly's avowed business reasons for the termination, to withstand this motion it must also place

---

[6] Lilly distinguishes each of these situations from the Levitt acquisition, explaining that the policy allowed exceptions when the retail pharmacies were to be "promptly divested." As to other circumstances, Lilly claims that the relationships between wholesalers and retailers did not constitute "common ownership or control" within the meaning of the policy.

in issue specific facts from which a jury could infer the existence of a conspiracy. See Lamb's Patio Theatre v. Universal Film Exchanges [1978-2 Trade Cases § 62,193], 582 F.2d 1068, 1070 (7th Cir. 1978). Moore alleges the following to support its claim of concerted action:

> (i) Lilly received frequent complaints from its wholesalers about Moore's price cutting.
>
> (ii) At a 1975 convention of the National Wholesale Drug Association, Lilly representatives met with officers of Spectro Drug, a Moore competitor, who complained and requested action from Lilly.
>
> (iii) Also in 1975, an officer of the wholesaler D.A. Rosow Company, another Moore competitor, brought a report of Levitt's acquisition to Lilly's attention through its regional representative. The report was passed on to Lilly by the representative with the following memo:
>
> "Coincidentally, some of the information herein is what we were looking for several weeks ago. His [allegedly Rosow's] motivation for leaving this with me? I'm sure he knows I'll send it along and subsequently another nail in H.L. M.'s box"

(iv) Lilly's representatives in the field received other general complaints from wholesalers, including D.A. Rosow, about Moore's competitive practices and reported them to Lilly.

(v) Moore was terminated in mid-1976, shortly after the alleged complaints reached their peak and the concerted actions allegedly occurred.

These allegations are sufficient to give rise to the inference of concerted action. See Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co. [1975-1 Trade Cases § 60,216], 513 F.2d 102 (2d Cir. 1975). See also Michelman v. Clark-Schwebel Fiber Glass Corp. [1976-1 Trade Cases § 60,843], 534 F.2d 1036, 1043 (2d Cir. 1976), (in the context of a horizontal conspiracy); Coleman Motor Company v. Chrysler Corporation [1975-2 Trade Cases § 60,592], 525 F.2d 1338, 1345 (3rd Cir. 1975) circumstantial evidence including conduct may be relied upon. Therefore Lilly, by its evidence

submitted on this motion, has not "conclusively disproven" the existence of the alleged conspiracy and summary judgment is inappropriate as to this element of plaintiff's claim. See Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc. [1969 Trade Cases § 72,773], 394 U.S. 700, 704 (1968).

3. Anticompetitive Effect [Territorial Restrictions]

Finally, to withstand this motion, Moore must place in issue allege sufficient facts from which a jury could infer that the conspiracy had an anticompetitive purpose or effect. See 15 U.S.C. § 1; National Auto Brokers v. General Motors Corp. [1978-1 Trade Cases § 61,931], 572 F.2d 953, 959-60 (2d Cir. 1978); Uniroyal v. Jetco Auto Service, Inc. [1978-2 Trade Cases § 62,194], 461 F.Supp. 350, 355 (S.D.N.Y. 1978). Moore alleges that Lilly's anticompetitive

purpose underlying the termination was to maintain prices and territorial restrictions on the resale of its products. By eliminating the price cutting competitor, at the behest of its distributors, Lilly allegedly intended to restrict intrabrand competition. Moore offers the following allegations of fact from which, taken together, this could reasonably be inferred.

(i) Lilly has the means to monitor the resale prices of its products by any wholesaler, authorized and non-authorized, through a nationwide, independent reporting service, Drug Distribution Data, Inc., (DDD). DDD reports sales of prescription drugs to retailers using a zip code-based system. Moore alleges that the reports, combined with other available information, including salesmen's reports from the field, constitute an overall monitoring practice by which Lilly obtains the iden-

tity of wholesalers who ignore its allegedly anticompetitive policies. Although Lilly asserts that such policing is impossible with a system whose reports do not identify specific wholesalers, questions of fact exist as to whether or not monitoring is possible, whether it exists, and if so, what is its purpose.

[Sales to Other Wholesalers]

(ii) Moore refers to a telephone call from a Lilly salesman in New York expressing concern over Moore's sale of a Lilly product to a New York retailer because the quantity shipped exceeded the retailer's particular needs. By inference this contact could evidence, as Moore alleges, a general prohibition against transhipping, (sales on the same level of distribution—e.g. by Moore, a wholesaler, to a retailer who would then act as a wholesaler), a practice that may undermine territorial restrictions on resale and increase com-

petition.

(iii) Lilly's "special deal" offers are not made available to wholesalers on merchandise sales to other wholesalers. By the "special deal" terms, on sales to retailers authorized distributors receive chargebacks on subsequent orders.[7] No cre-

---

[7]The "special deals" were offered to wholesalers on the following terms:

> "Available on sales to pharmacies, hospitals, nursing homes, physicians and industrials, but not to Federal Government agencies, physicians' supply houses, surgical supply houses, non-Lilly wholesalers or any firm which resells to other dealers.
> "As this offer is based on regular suggested net trade prices, sales to accounts with purchase agreements, utilizing the purchase agreement special suggested net trade prices, would not be eligible.
> "The suggested quantity price schedule rates remain in effect during the offer. However, it should be pointed out that these prices are not used in determining the total value of an offer. The offer value and the 15% discount, which we suggest be passed on to the wholesaler's customer, are based on the regular suggested net trade prices.
> "This offer is primarily a wholesaler promotion. Lilly sales representatives will provide a supportive role where needed."

dit is given to wholesalers who violate the terms of the offer by selling to other wholesalers. Lilly investigates to determine if the chargebacks being claimed are creditable.

In other words, if an authorized Lilly wholesaler wishes to sell special deal merchandise to another wholesaler, which Moore does, it must forfeit the discount price. Thus, a wholesaler must restrict the range of its resale customers if it wishes to receive the chargeback credit. It is alleged that authorized wholesalers are coercively forclosed from reselling to other wholesalers outside of their territories restraining competition at both the wholesale and retail levels of distribution.

(continued on next page)

(continued from previous page)

On the state of this record Moore has sufficiently alleged that it was terminated in furtherance of a conspiracy in restraint of trade. Taking the facts and inferences alleged as a whole, it would not be unreasonable for a jury to conclude that the Lilly business practices were anticompetitive in purpose and effect. The dispute over their actual effects and Lilly's true purpose for their adoption must await resolution at trial. [8]

---

[8] Lilly offers contrary explanations of its reasons for certain policies but its state of mind is one factor going to the actual or intended market impact of the business practices Moore complains of. See e.g. Northwest Power Products, Inc. v. Omark Industries, Inc. [1978-2 TRADE CASES § 62,142], 576 F.2d 83, 90 (5th Cir. 1978). Disputed intent is best resolved at trial, where the credibility of witnesses may be assessed by the jury. See Poller, supra at 473.

In sum, Moore has alleged sufficient facts to support the following scenario: Moore chose to ignore Lilly's inducement to sell to other retailers and instead sold to non-authorized wholesalers and to retailers nationwide, without regard for authorized wholesalers' territories and at significantly lower prices. Lilly, through its monitoring system and the complaints of other authorized wholesalers, discovered Moore's violations of its policies. Upset over Moore's practices, Lilly and its authorized wholesalers conspired to eliminate the troublemaker, using the non-affiliation policy as a facade for the termination of its distributorship. The termination was premised upon an anticompetitive purpose and effect: i.e. eliminating Moore's competitive presence from certain markets.

Therefore, in view of Moore's factual allegations, and the conflicting inferences that may reasonably be drawn from them, this action must proceed to trial on the merits. The motion for summary judgment is denied. The parties are directed to submit to this court a joint pre-trial order and briefs within the month of this opinion.

It Is So Ordered.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, H.L. MOORE DRUG EXCHANGE, DIVISION OF/AND LEVITT INDUSTRIES, INC. v. ELI LILLY AND COMPANY, 1980-2 Trade Cas. [CCH] ¶63,300 (S.D.N.Y. 1980)

Opinion

Sweet, D.J.: The trial of this private antitrust action took five days, in the course of which six witnesses testified and 15 exhibits were introduced. The jury returned a special verdict for the plaintiff, H.L. Moore Drug Exchange ("Moore") and its parent corporation, Levitt Industries ("Levitt"). Defendant Eli Lilly and Company ("Lilly") has moved for judgment notwithstanding the verdict in accordance with Fed. R. Civ. P. 50(b) or for a new trial pursuant to Fed. R. Civ. P. 59. The motion is denied for the reasons stated below.

Briefly stated, Moore is a nationwide wholesaler of pharmaceuticals and Lilly is one of the nation's largest manufacturers and distributors of pharmaceuticals. Lilly distributes its prescription and non-prescription drug products only through authorized wholesale distributors. In 1971, as the result of a settlement agreement in a separate antitrust proceeding between the parties, Moore became an authorized wholesale distributor of Lilly's.

[Non-affiliation]

In 1975, Moore's parent, Levitt, acquired a chain of eight retail pharmacies known as the Mall Drug Stores. Soon thereafter, Lilly informed Moore that its wholesale distributorship would be terminated, allegedly pursuant to Lilly's "non-affiliation" policy of not selling to distributors which are affiliated with retail pharmacies. Moore

initiated this action under section 1 of the Sherman Act, 15 U.S.C. § 1, and obtained a preliminary injunction requiring Lilly to continue to make its products available to Moore pending the outcome of the trial.

The theory of Moore's action is that the termination was not the result of Moore's alleged violation of the non-affiliation policy, but rather the result of an illegal conspiracy between Lilly and certain of its wholesale distributors who competed with Moore for retail orders. The alleged object of the conspiracy, to terminate Moore, resulted from the alleged conspirators' illegal anticompetitive intent to enforce unreasonable restraints of trade, i.e., territorial restrictions and minimum prices on the resale of Lilly's prescription drug products to retailers. As noted in this court's earlier opinion denying Lilly's motion for summary judg-

ment, the factual issues to be determined were (i) whether Lilly's non-affiliation policy was a sham; (ii) whether there was a conspiracy to terminate Moore; and (iii) whether the conspiracy had the anticompetitive purpose or effect of maintaining prices or territorial restrictions on the resale of Lilly products. H.L. Moore Drug Exchange v. Eli Lilly and Company [1979-1 Trade Cases § 62,674], No. 76-2817 (S.D.N.Y. May 8, 1979) at 3.

As mentioned earlier, the jury made the requisite findings to make out a violation and Lilly has moved to set aside the verdict. A motion for a judgment n.o.v. may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment, and it is a verdict for the moving party. Where there is conflicting evidence, or there is

insufficient evidence to make a "one-way" verdict for the movant proper, judgment n.o.v. should not be awarded. 5A Moore's Federal Practice § 50.07[2] at 50-79 (2d ed. 1979). See also Gehrhardt v. General Motors Corp., 581 F.2d 7, 14 (2d Cir. 1978). In considering the evidence, the judge must view the evidence in the light most favorable to the party who secured the jury verdict. 5A Moore's Federal Practice, supra at 50-82; Gehrhardt v. General Motors, 581 F.2d at 10 n. 3.

In contrast, a motion for a new trial on the ground that the verdict is against the weight of the evidence may be granted even where a judgment n.o.v. is not justified. The trial judge is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner. Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1978).

However, the verdict should not be set aside as against the weight of the evidence merely because the judge would have reached a different result had he acted as the trier of fact. 6A Moore's Federal Practice § 59.08[5] at 59-159 (2d ed. 1979). The judge should abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. Id. at 59-160. See also Bevevino v. Saydjari, 574 F.2d at 684.

Since conspiracies are rarely evidenced by explicit agreements, the determination of whether a conspiracy existed almost inevitably rests on the inferences that may be drawn from the behavior of the alleged conspirators. See Michelman v. Clark-Schwebel Fiber Glass Corp. [1976-1 Trade Cases § 60,843] 534 F.2d 1036, 1043 (2d Cir. 1976). Although on the entire proof adduced at

trial this court would not have found that Moore was terminated as a result of a conspiracy to restrict prices and territories, the evidence submitted to the jury was sufficient for it to draw such an inference.

The evidence revealed that in the 1960's Moore commenced wholesaling products-principally by mail-by buying from Lilly wholesalers (Tr. 50-55). Moore was unable to purchase directly from Lilly because Lilly said it had adequate distribution in the area and because it only sold to members of the National Wholesale Druggists Association (Tr. 53). There came a time when Moore was unable to purchase Lilly drugs from any wholesaler (Tr. 56-57), but after a lawsuit was brought against Lilly, a settlement was effected that provided for Moore to purchase directly from Lilly (Tr. 58).

1. The Non-Affiliation Policy

A considerable part of the proof at trial related to Lilly's non-affiliation policy. Briefly stated, Lilly asserted that it would not sell its products to any wholesaler affiliated with a retail pharmacy, claiming that this prohibition was necessary to maintain the integrity of the distribution process. Plaintiff vigorously contested this assertion and sought to establish that the non-affiliation policy was a sham, at least as it applied to Moore in these circumstances. Although Lilly had notified its wholesalers of its policy by a letter dated October 23, 1973 there was sufficient evidence to support plaintiff's view of the nonaffiliation policy, since the testimony revealed that this "policy" was not stringently enforced against other "violaters" such as Rogers Wholesale Drugs (Tr. 68, 217-20, 259, 482-85);

Kiefer-Stewart Company (Tr. 68, 225, 479-82); and Kaufman-Lattimer Co. (Tr. 214-17, 486-95). Although Lilly offered explanations for each of these "exceptions" to the rule, they need not have been credited by the jury.

2. Conspiracy

If the jury concluded, as it apparently did, that Lilly's termination of Moore was for a reason other than the stated non-affiliation policy, it was then obligated to consider whether a conspiracy existed between Lilly and its wholesalers. Of course, a person has a right to refuse to do business with anyone, provided he acts independently and not pursuant to an unlawful understanding, tacit or expressed. See Modern Home Institute, Inc. v. Hartford Acc. & Ind. Co. [1975-1 Trade Cases § 60, 216], 513 F.2d 102, 108 (2d Cir. 1975).

In this case, the direct evidence of the existence of such an understanding or conspiracy is very sketchy. There was testimony that prior to Moore's termination, complaints were received from other wholesalers about Moore's acquisition of the Mall Drug Stores (Tr. 323) and that officers of the wholesaler D.A. Rosow Company made repeated complaints about Moore (Tr. 277-81). Standing alone, such complaints by competitors do not constitute a basis for finding a conspiracy. Modern Home Institute v. Hartford Acc. & Ind. Co. [1975-1 Trade Cases § 60,216], 513 F.2d 102; Westinghouse Electric Corp. v. CX Processing Laboratories, Inc. [1975-2 Trade Cases § 60,508], 523 F.2d 668 (9th Cir. 1975); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc. [1979-2 Trade Cases § 62,951], 478 F. Supp. 243, 255 (E.D. Pa. 1979); Carbon Steel Products Corp. v.

Alan Wood Steel Co. [1968 Trade Cases § 72,562], 289 F. Supp. 584 (S.D.N.Y. 1968). There was in addition, however, the article sent to Lilly by Gerald Rosow about Moore's affiliation with the Big L discount stores,[1] which prompted the "nail-in-the-box" memorandum from Harold Katz, the Lilly salesman. This note has some element of consensuality about it by virtue of its vivid language and its progress through the Lilly chain of command.

---

1 The Big L stores were a chain of discount stores owned by Parkway Distributors. Moore was also a division of Parkway Distributors, and at the time that Lilly agreed to do business with Moore in 1971, the Parkway-Moore affiliation already existed.

(Tr. 288-92).[2]

Finally, there was the November 1975 meeting between Lilly and Spectro Industries, a significant Lilly wholesaler, during the annual meeting of the National Wholesale Druggist Association, at which time Moore was discussed. Both

---

[2] The article was sent along with Katz's memorandum which stated:

> "Coincidentally, some of the information herein is what we were looking for several weeks ago. His [allegedly Rosow's] motivation for leaving this with me? I'm sure he knows I'll send it along and subsequently another nail in H.L.M.'s box!!"

The evidence revealed that this article and memorandum were sent to Phil Schockman, Lilly's Manager of the Boston District (Tr. 290; Pl. Ex. 18a) who in turn forwarded them to Gary Tauscher, Assistant Director of Sales for the Eastern Region (Pl. Ex. 18a) and that from there they went up to Robert Manning, Lilly's Director of Professional Relations and Services (Pl. Ex. 18b). Manning testified that "important" information would go up the ladder in this manner (Tr. 463).

Lilly and Spectro representatives testified to the substance of the meeting (Tr. 247-48, 255-56, 324, 465-69, 502-03, 505-06), which if credited did not constitute an agreement to terminate Moore. There was testimony, however, indicating that Moore's affiliation with the Mall Drug Stores was discussed (Tr. 247, 255). There was also testimony that Lilly told Spectro that it would investigate the situation (Tr. 248).

3. Anticompetitive Purpose or Effect

The question of whether Moore's termination would have an anticompetitive effect on the price of Lilly's products was also disputed. Gerald Rome, the Executive Vice President of Moore, testified that he believed that Moore offered the lowest prices in the country on the Lilly line (Tr. 96, 105). H.L. Moore, the plaintiff's founder, testified that because of Moore's discounting on Lilly

products, other wholesalers are forced to cut prices to meet the competition (Tr. 88). However, John Fenstermaker, a former senior vice president at McKesson & Robbins Drug Company, testified that he did not agree with Rome's assertion that Moore offered the lowest prices in the country on the Lilly line (Tr. 561). While Robert Manning, Lilly's Director of Professional Relations and Services, testified that he did not believe that Moore was much competition for any of its wholesalers (Tr. 394), he admitted that if Lilly's other wholesalers sold at the prices Moore charged, there would be "some economic bruising taking place" (Tr. 369).

The allegation that defendant acted with a purpose to maintain price and territorial restrictions was similarly contested. There was evidence that Lilly published a price list with suggested

retail prices (Tr. 393), although other major pharmaceutical companies do not (Tr. 397). There was also testimony that Lilly did not permit its wholesalers to sell special deal items to other wholesalers or to any firm which resells to other dealers (Tr. 100-101, 118). Neither of these activities is illegal in themselves, however, and there was evidence that the majority of Lilly items sold were being sold by Lilly wholesalers below the suggested list price (Tr. 394).

On the issue of territorial restrictions, there was testimony indicating that wholesale distributors have been denied the opportunity to become Lilly wholesalers because there was adequate distribution in an area (Tr. 421). The deposition testimony of Katz stated that Gerald Rosow "made no bones about his feeling that [Moore] shouldn't have been

franchised in his trading area." (Tr. 291). At the same time, there was testimony indicating that while there were no restrictions on where wholesalers sell, most sell within a 300 mile radius of their location because of natural limitations on the services they can provide (Tr. 424). There was also testimony to the effect that other wholesalers in addition to Moore were selling nationwide (Tr. 426).

As can be seen from the evidence, defendant urged the jury that the facts established that it acted unilaterally, that it had no policy of enforcing its recommended list price, and that the termination of Moore resulted from its refusal to comply with the non-affiliation policy. Plaintiff urged that Lilly acted by implicit agreement with Spectro, contrary to the stated version of their meeting, and with other wholesalers as to

which no evidence of tacit agreement has been adduced, except perhaps for the "nail-in-the-box" memorandum. While these communications were mainly directed to the failure to comply with the non-affiliation policy, plaintiff argued that it was simply an excuse that Lilly and its wholesalers used to seek and justify the termination of Moore to eliminate its price competition and mail order selling into the territories of other wholesalers.

The inferences asked to be drawn by the plaintiff were not compelling to the court, but did result in a jury verdict which this court cannot say is against the clear weight of the evidence or seriously erroneous. The history of the relationship between the parties, the effect of Moore's practices on the prices of other wholesalers, the complaints of the wholesalers, the "nail-in-the-box" memorandum, the Spectro meeting, together with the sham

explanation for termination, are enough-albeit barely-to support the jury's verdict. Consequently, Lilly's motion for a judgment n.o.v. or for a new trial on the ground that the verdict is against the weight of the evidence is denied.

[New Trial]

Defendant Lilly has also moved for a new trial on the ground that an adjournment of the trial was not granted when it was learned immediately prior to trial that Gerald Rosow would not be available to testify for another month. The motion is denied, because despite Lilly's contention that Rosow's testimony was critical to defuse speculation about the "nail-in-the-box" letter, it was in fact Katz's understanding of Rosow's intent that was critical, since he authored the memorandum. It is significant that Lilly chose not to call Katz to testify, even though he was in their emply and was listed as a

defense witness in the pretrial order. It is also significant that Lilly made no attempt to depose Rosow and apparently did not try to ascertain his availability for trial even though it had knowledge of the approximate trial date two full months before the trial commenced.

[Lost Profits]

The other issues raised by Lilly as grounds for a new trial[3] will not be further considered with the exception of the lost profits issue. When Lilly informed Moore in 1976 that it would not renew its contract when it expired on June 30, 1976, Lilly put Moore on cash

---

3 Those issues include claimed errors in the charge to the jury in (i) the failure to instruct the jury that it could not base a finding of conspiracy on the mere fact that other wholesalers complained to Lilly about Moore and in (ii) the instruction to the jury that "a manufacturer has a legal right to refuse to deal with anyone so long as it does so for legitimate purposes. . ." Lilly also claims it was error for the court to refuse to permit the introduction of evidence that Moore infringed Lilly's patents after the commencement of this action.

with order. The same cash with order arrangement continued when the preliminary injunction went into effect. At trial, Moore estimated lost profits of $24,000 resulting from having to pay C.O.D. in lieu of normal payment terms. It also put in an exhibit estimating $40,000 lost profits because it was not given extended dating credit on special offers of Darvon that were made available to Lilly's other wholesalers.

Lilly now asserts that as to the latter claim, Moore is only entitled to any expenses it would have incurred in paying cash for Darvon products, and not some larger amount which it lost because it chose not to pay cash for those products. In support of its position, Lilly relies on Warren v. Stoddart, 105 U.S. 224, 229-30 (1882), in which the Supreme Court in a contract action stated in dictum that where defendant violated his contract in

refusing to fill plaintiff's orders except for cash, the measure of plaintiff's damages would be the interest for thirty days on the amount of cash paid on his orders. The Court disallowed plaintiff's claim for the cost of substituting defendant's books for another stating "that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it." Id.

The defendant has not pointed to any cases in the antitrust context in which damages have not been permitted for all lost profits where there has been a cut-off of credit. In fact, in the only antitrust case unearthed by the court in which damages were claimed for the withdrawal of extended credit terms, the court seemed to operate under the premise that recovery could be had for such an

action where there was adequate proof of loss. Wall Products Co. v. National Gypsum Co., [1973-1] Trade Regulation Reports (CCH) § 74,461 (N.D. Cal. 1973). While it is true that plaintiff was obligated to make reasonable efforts to mitigate its loss, see e.g., Triebwasser & Katz v. American Telephone & Telegraph Co. [1976-1 Trade Cases § 60,888], 535 F.2d 1356, 1360 (2d Cir. 1976); Sun Cosmetics Shoppe, Inc. v. Elizabeth Arden Sales Corp. [1948-1949 Trade Cases § 62,521], 178 F. 2d 150, 153 (2d Cir. 1949), Moore's accountant explained why it would not have been reasonable for it to tie up its capital on promotional deals or to borrow money to participate in those deals (Tr. 179-83). Since no evidence was offered by defendant on this subject and no charge was requested on mitigation, and since this court is convinced that the award is supported by the evidence, the damages

award will be allowed to stand.

What remains is a determination of the equitable relief sought by Moore and resisted by Lilly on the basis of unclean hands. A hearing will be held in the near future and briefs may be submitted that further address this issue. As soon as this equitable issue is resolved a judgment will be entered concluding the proceedings in this case.

It Is So Ordered.

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, H.L. MOORE DRUG EXCHANGE, DIVISION OF/AND LEVITT INDUSTRIES, INC. v. ELI LILLY AND COMPANY, 1980-81 Trade Cas. [CCH] ¶63,652 (S.D.N.Y. 1980)

Opinion

Sweet, D.J.: This hard fought anti-trust litigation nears its conclusion at the trial level. A jury verdict was rendered on behalf of plaintiff H.L. Moore Drug Exchange, division of/and Levitt Industries, Inc. ("Moore") against defendant Eli Lilly and Company ("Lilly") on September 18, 1979. The motion of to set aside the verdict was denied by opinion dated April 15, 1980

(continued on next page)

and on September 18 and 19, 1980 a hearing was held and testimony received relating to the additional relief sought by Moore, namely, the issuance of a permanent injunction which would bar Lilly from terminating Moore as a wholesaler and distributor of Lilly products.

Since 1966, Moore has litigated with Lilly to compel Lilly to sell its products through Moore as a wholesaler. Since 1971 Lilly has sought to terminate the relationship, unsuccessfully. What now is at issue is the future relationship between the parties. A final judgment enjoining Lilly in accordance with this opinion will be entered.

Shortly after the initiation of this action in 1976 Moore sought to restrain Lilly preliminarily from terminating their relationship, a relationship which had resulted from prior litigation between the parties. Lilly agreed to continue to do

business with Moore as one of its wholesalers pending the determination of this action, and that status has remained to date, notwithstanding the conduct of Moore which was the subject of the recent hearing.

I find that Lilly has established that in 1977 and 1978 Moore sold products which, according to Lilly, infringed its patents. Lilly commenced an action against Moore for this infringement, the action against the infringing manufacturer was settled, and Moore continued its sale of the infringing products until its stocks were exhausted. In 1979, Lilly sued Moore for selling another and different infringing product, and served Moore with an injunction barring such sales, which injunction Lilly maintains was violated. Moore sold in the neighborhood of 15,000 units of the infringing products, knowing of the claimed infringements and

Lilly's policy to prevent such sales. Absent further injunction, Lilly will terminate the distribution of its products by Moore.

The establishment of the antitrust violation by Lilly has been the subject of the earlier opinion denying Lilly's motion for judgment n.o.v. The violation found by the jury occurred but once and involved a combination with but one competitor of Moore. Moore will receive compensation as a result of the jury award, and Lilly has been punished by the trebling of that award.

[Injunctive Relief]

A permanent injunction against future violations is appropriate in order to enforce the antitrust laws, see Zenith Radio Corp. v. Hazeltine Research, Inc. [1969 Trade Cases § 72,800], 395 U.S. 100, 129-33 (1969); United States v. Oregon State Medical Society [1952 Trade Cases

§ 67,264], 343 U.S. 326, 333 (1952); International Salt Co. v. United States [1946-1947 Trade Cases § 57,635], 332 U.S. 392, 400 (1947), but a mandatory injunction to compel the continuation of the relationship between these companies for all time is not. It is recognized on the one hand that antitrust violations should be enjoined and on the other that absent antitrust considerations a manufacturer may select its own wholesalers. See Oreck v. Whirlpool Corp. [1978-1 Trade Cases § 62,026], 579 F.2d 126, 133 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1978); Jacobson & Co. v. Armstrong Cork Co. [1977-1 Trade Cases § 61,479], 433 F. Supp. 1210, 1216 (S.D.N.Y. 1977).

A finding of an antitrust violation in the past, and an award of treble damages pursuant thereto, do not automatically entitle the plaintiff to permanent injunctive relief. For the latter, there must

be a showing of the danger of recurrence or continuation of the violation, and the significant threat of injury to the plaintiff therefrom. Zenith Radio v. Hazeltine Research, Inc., supra, at 130; United States v. Oregon Medical Society, supra; Bray v. Safeway Stores, Inc. [1975-1 Trade Cases § 60,193], 392 F. Supp. 851, 867-68 (N.D. Cal. 1975); Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc. [1974-1 Trade Cases § 75,034], 375 F. Supp. 586,626 (E.D. Pa.), modified on other grounds, [1974-2 Trade Cases ¶ 75,359], 383 F.Supp. 610 (E.D.N.Y. 1974); United States v. Uniroyal, Inc. [1969 Trade Cases § 72,786], 300 F. Supp. 84, 95-96 (S.D.N.Y. 1969). However, a court is "not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than [the judgment] requires. . . ." F.T.C. v. National Lead Co. [1957 Trade Cases § 68,629], 352 U.S. 419, 430

(1957), quoting International Salt Co. v. United States, supra. See also Local 167, I.B.T. v. United States [1932-1939 Trade Cases ¶ 55,043], 291 U.S. 293, 298 (1934).

Here, the jury found that Lilly conspired with other wholesalers to terminate Moore, in violation of the Sherman Act. Thus, Lilly's explanation for the termination-a policy of prohibiting wholesalers from being under common ownership or control with retail pharmacies-necessarily was found to be only a pretext. The evidence of the violation was not overwhelming, but sufficient to support the verdict. Together with this fact must be considered Lilly's longstanding desire to end direct dealings with Moore, based on the sale of infringing products as just described, which was the subject of testimony at the September 18-19 hearing.

In the course of this action, Lilly has also advanced what it believes to be

other valid business reasons for preferring wholesalers who provide personal service as opposed to mail order.

[Three-Year Cooling-Off Period]

With these factors in mind, the injunction devised in a similar situation in Phillips v. Crown Central Petroleum Corp., 1977-1 Trade Cases § 61,524-25 (D. Md. 1975), aff'd [1979-2 Trade Cases § 62,743], 602 F. 2d 616, 629-31 (4th Cir. 1979), cert. denied, ___U.S.___, 100 S. Ct. 1021 (1980) commends itself here. Given the fact of violation by Lilly, the damages already awarded, the conduct of Moore with respect to infringing products, and the customary duration of wholesalers' agreements, what is required for these litigants is a period of repose-of cooling off-following the declaration of their rights. Lilly cannot be compelled for all time to do business with Moore, nor can it terminate the rela-

tionship between the parties for an improper purpose violative of the antitrust laws. I conclude that Lilly should be enjoined for a period of three years from engaging in the conduct here found to be illegal. Lilly should also be required to enter into the customary wholesalers' arrangement with Moore to continue for twelve months from the entry of this judgment, such agreement not to be refused renewal thereafter for any retaliatory reason related to this action, including the past sale of any infringing products, or for any reason prohibited by the antitrust laws. Submit judgment on notice.

It Is So Ordered.

APPENDIX D

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, H.L. MOORE DRUG EXCHANGE, DIVISION OF/AND LEVITT INDUSTRIES, INC. v. ELI LILLY AND COMPANY, 662 F.2d 935 (2d Cir. 1981)

Before LUMBARD, MANSFIELD and VAN GRAAFEILAND, Circuit Judges.

MANSFIELD, Circuit Judge:

In this action pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, defendant Eli Lilly and Company ("Lilly"), one of the nation's largest manufacturers and distributors of pharmaceutical products, appeals from an order of the Southern District of New York entered by Judge Robert W. Sweet, denying Lilly's motion for judgment notwithstanding the verdict or for a new trial, made after a jury trial resulted in a special verdict finding Lilly liable for unlawful termination of H.L. Moore Drug Exchange ("Moore"), one of its wholesalers, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and from a judgment awarding damages, attorneys' fees, and granting injunctive relief against Lilly. From 1971 to 1976 Moore, a nationwide wholesaler of pharmaceuticals, was an

authorized wholesaler for Lilly. Moore claimed that its termination in April, 1976, was due to a conspiracy between Lilly and certain of its wholesalers to restrict territories and maintain prices. We reverse on the ground that there was insufficient evidence of the alleged illegal conspiracy to support the jury verdict.

Guided by the standard that the evidence must be viewed in the light most favorable to the prevailing party (see pp. 940-941, infra), we summarize the record proof. Since at least 1986, Lilly has sold its drug products only to authorized wholesalers and currently sells to some 367 wholesalers throughout the country.

---

[1] Since we dispose of the case on this ground, we need not and do not reach Lilly's other grounds of appeal, namely, that a new trial should have been granted, that the jury instruction was erroneous, that the injunction ordering Lilly to continue doing business with Moore was an abuse of discretion, and that the prejudgment interest awarded by the district court was unauthorized by law.

As part of its wholesaler-only policy, Lilly has long had an announced corollary policy of selling only to wholesalers not affiliated with retail pharmacies. On October 23, 1973, Lilly reaffirmed its "non-affiliation policy" in a letter to all its wholesalers which stated that Lilly was continuing "some long-established policies," namely that it

> "will not sell its products directly to retail pharmacies or hospitals or to wholesalers who directly or indirectly own or control, are owned or controlled by, or are under common ownership or control with retail pharmacies. This policy will apply to any Lilly wholesaler who becomes involved with such an ownership or control situation unless the retail pharmacy operations are divested promptly."

Moore first became a Lilly wholesaler in 1971, as part of the settlement of an earlier antitrust suit filed by Moore against Lilly. That suit arose out of Lilly's refusal to sell to Moore when Moore first entered the wholesale business as an innovator in wholesale techniques, offer-

ing discounts to retailers and using the mails to expand its market nationally. Lilly based this earlier refusal to sell to Moore on the fact that Lilly had an adequate distribution system and that Moore was not a member of the National Wholesale Druggists Association ("NWDA"). Until 1966, however, Moore was able indirectly to obtain Lilly products by purchasing them from authorized Lilly wholesalers, some of whom had actively sought Moore's clientele. In 1966 these sources refused to continue supplying Moore. Moore then filed suit against Lilly, alleging that Lilly had obtained the identities of these suppliers and was responsible for the cut-off. That suit was settled by Lilly's agreeing to sell to Moore.

At the time of the 1971 agreement Moore was owned by Parkway Distributors, which also owned over 100 "Big L" stores.

The latter are retail discount stores carrying, among other things, certain non-prescription Lilly products. Although Parkway was a signatory to the 1971 wholesale agreement between Lilly and Moore, and was named in Moore's annual reports submitted by request to Lilly, Parkway's ownership of the Big L stores was not known to Mr. Manning, the Lilly executive in charge of wholesale relations, until late 1973 or early 1974. When Lilly discovered Moore's affiliation with the Big L stores, it conducted an investigation and concluded that, since the latter were not retail pharmacies but retail stores selling health and beauty aids along with some non-prescription Lilly products, they did not violate the non-affiliation policy, which was expressly limited to affiliations with "retail pharmacies."

During the course of the Big L investigation, an officer of one of Lilly's wholesalers, Gerald Rosow, passed along to Harold Katz, a Lilly salesman, an unsolicited article from a trade publication discussing among other things Parkway's ownership of both Moore and the Big L stores. Katz was one of over 1,200 Lilly sales representatives whose primary duty was to promote Lilly products to physicians. Following his normal procedure, Katz passed the article on to Phil Shockman, Lilly's Boston District Manager, who a month or so before had spoken with Katz about Lilly's investigation of the Big L stores. Katz attached to the article a handwritten memorandum (the so-called "nail-in-the-box" memorandum), making reference to Shockman's earlier request for information and speculating about Rosow's

motive for giving him the article: [2]

> "Coincidentally, some of the information therein is what we were looking for several weeks ago.
>
> "His motivation for leaving this with me? I'm sure he knows I'll send it along & subsequently another nail in H.L.M.'s box!!"

The article and the memorandum eventually reached Mr. Manning, who at that time had already received other reports concerning the Big L stores. According to Mr. Manning, while the article may have been important, the attached memorandum was "unimportant." In any event, as already indicated, Lilly took no

---

[2] Katz' use of the "nail-in-the-box" metaphor to describe Rosow's motives in handing over the article must be viewed in its context. Rosow had the reputation of being a very aggressive wholesaler and, according to Katz, Rosow regularly "accosted" the local Lilly representative with numerous complaints about business problems such as late shipments from Lilly. With respect to Moore, Rosow had made known his feeling that Moore should not have been franchised in what Rosow considered to be his trading area, and would complain to Katz about any irregularities in Moore's operation, such as Moore's failure to correct mistaken shipments.

action concerning the Big L stores, having concluded that they were not retail pharmacies and therefore did not violate the non-affiliation policy.

Some time after the 1971 agreement Parkway, Moore's parent company, acquired Northeast Medical Supplies, Inc. ("Northeast"), which filled specialized prescriptions for various health facilities. A Lilly memorandum addressed to Mr. Manning dated January 15, 1974, mentioned Parkway's ownership of Northeast. Mr. Manning testified that this brief reference made no impression on him at the time and that as a result Lilly never made a determination whether the Northeast affiliation violated Lilly's policy.[3]

---

[3]The January 15, 1974, memorandum, which was two and a half pages long and reviewed the possible retailer affiliations of 12 different Lilly wholesalers, contained the following short statement, among many other unrelated matters, with respect to Moore:

Thus, with respect to both the Big L and the Northeast affiliations, Lilly did not understand Moore then to be in violation of nonaffiliation policy. Moreover, in March, 1974, Lilly was explicitly informed by Moore, in response to a questionnaire Lilly had sent to all its wholesalers, that Moore "did not have an ownership or control relationship of the character described" in Lilly's October 23, 1973 let-

---

> "The parent (Parkway) through its subsidiaries operates 18 retail departments in discount stores known as Big L. Stores. We are led to believe that these activities deal in health and beauty aids. On the other hand, a major subsidiary, Northeast Medical Suppliers, Inc. supplys [sic] specialized prescription filling for various health facilities."

Mr. Manning testified that the final sentence referring to Northeast did not regiester or make an impression with him at the time, because "there are wholesalers who do repackaging of bulk merchandise, which is not really a prescription-filling operation, which could be referred to as that." According to Manning, only after the commencement of the trial below did he become consciously aware of Parkway's earlier affiliation with Northeast.

ter reaffirming its non-affiliation policy. The questionnaire was signed by Mr. Rome, the executive vice-president and general manager of Moore.

Some time in November, 1975, Lilly learned that in October Moore had acquired a chain of retail pharmacies known as the Mall Drug Stores which, unlike the Big L stores, clearly fell within the prescription of Lilly's non-affiliation policy. The acquisition was reported in trade publications as well as the regular press, including the Wall Street Journal. In addition, at the annual meeting of the NWDA in November, Moore's acquisition was called to Lilly's attention in a general way by several wholesalers, and more specifically by Spectro Industries, a conglomerate of wholesalers located in the Northeast.[4]

---

[4] There is some ambiguity about how and when Lilly first learned of Moore's ac-

The executives of Spectro met with the Lilly executives, in keeping with Spectro's practice at the NWDA gatherings to meet with each of its 25 or so major suppliers in order to discuss general business matters such as sales promotion. During the course of this meeting, which was a private meeting according to Dr. Manning and which covered many topics, Spectro asked if Lilly still adhered to its non-affiliation policy, and pointed out that Moore had recently acquired a chain of retail pharmacies. Lilly responded that the policy was still in effect, and that the matter was under consideration and would be investigated.[5] There is no evidence of

---

quisition of Mall Drug Stores. Mr. Manning testified that there were newspaper and trade press clippings about the acquisition, and that "concurrently or practically concurrently" with these sources Lilly also heard about the acquisition at the November, 1975, NWDA meeting.

[5]There was some inconsistent testimony concerning the details of this meeting. Step, Lilly's President, said the meeting

any agreement at the meeting relating in any way to Moore's termination or to maters such as price maintenance or territorial restrictions.

In December, 1975, Mr. Manning called Mr. Rome of Moore to ascertain information about Moore's acquisition of Mall Drug Stores and to remind Moore of Lilly's nonaffiliation policy. Mr. Rome confirmed the acquisition, explaining that it was part of Moore's plan to expand its business. He stated that Moore had no intention of divesting itself of the Mall Drug Stores and that if Lilly had further questions it should contact Moore's lawyers. Lilly decided then to wait and see if Moore would divest itself of its retailer affiliation. When it

---

occurred over lunch; Manning placed it in a private hotel room. Garde, Spectro's President, could not recall if Moore's name was specifically mentioned during the meeting; both Manning and Step stated that the name was mentioned.

became clear that Moore had no intention of divesting, Lilly notified Moore in April of 1976 that its then current contract, due to expire on June 30, 1976, would not be renewed because of Moore's continued affiliation with the Mall Drug Stores.

Moore then instituted the present suit, claiming that the non-affiliation policy was a mere pretext, masking an unlawful conspiracy between Lilly and certain of its wholesalers to restrict territories and control prices. Moore's complaint alleged that Lilly's termination of Moore violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), § 3 of the Clayton Act, 15 U.S.C. §§ 14 (1976), and § 2 of Connecticut's Fairness in Franchising Act, Conn. Gen.Stat.Ann. §42-133f (West Supp. 1980), and constituted a breach of the 1971 agreement between Moore and Lilly. Pursuant to Lilly's motions, Judge Lee P. Gagliardi dismissed all of Moore's claims except its claim under §1 of the Sherman Act.

After a five-day jury trial in which six witnesses testified and fifteen exhibits were introduced, the jury returned a special verdict in favor of Moore, finding that it had sustained $64,000 in damages. Lilly moved pursuant to Fed.R.Civ.P. 50(b) and 59 for judgment notwithstanding the verdict or for a new trial. Judge Sweet denied these motions. With respect to the alleged conspiracy, he found that the proof was entirely circumstantial and consisted of the inferences to be drawn from the "nail-in-the-box" memorandum, the Spectro meeting, and the history of Lilly's relationship with Moore. In addition, there was some evidence from which it might be inferred that the non-affiliation policy was a mere pretext or "sham" reason for Lilly's termination of Moore, namely, that Lilly had disregarded Moore's earlier affiliations with the

Big L stores and Northeast, that Moore was the only Lilly wholesaler ever terminated under the policy, and that the policy had not been enforced against some of Lilly's other 367 wholesalers. Moore claimed that there were at least nine Lilly wholesalers who at some point were affiliated with retail drug operations but who were never terminated. Although there was some evidence of some connection between certain wholesalers and retailers, Lilly contended that in these nine instances the connections were much more attenuated and impermanent and pointed to the fact that in several cases the wholesalers divested themselves of their retailer affiliations after being reminded of Lilly's policy. The evidence is reasonably clear that in no case was there as clearcut and unyielding a violation of Lilly's non-affiliation policy as Moore's outright ownership of a chain

of retail pharmacies and its declared intention not to divest. Judge Sweet found that, while Lilly offered explanations for the nine instances, they need not have been credited by the jury. Moore argued that the jury could infer the existence of a conspiracy from its rejection of Lilly's explanation for its termination of Moore.

In reviewing the proof of Lilly's alleged purpose to control prices, Judge Sweet found that there was evidence that Lilly, unlike the other major pharmaceutical companies, published a list of suggested retail prices, restricted its discount offerings to resales to retailers, and did not extend the discounts to sales by wholesalers to other wholesalers. The court concluded, however, that neither activity was illegal in itself, and that there was evidence that the majority of Lilly items were being sold by

Lilly wholesalers below the suggested list prices. On the issue of territorial restrictions, the court referred to evidence that wholesalers have been denied Lilly contracts because there was adequate distribution in an area, and that a Lilly wholesaler -Rosow- had made clear its displeasure in Moore's enfranchisement. At the same time, however, the court noted that there was evidence that wholesalers were not restricted as to the area where they could sell, and that most sold within a 300-mile radius of their locations because of "natural limitations" in the services they could provide. While Moore contended that its nationwide marketing was one reason for its termination, the court noted that there was evidence that other Lilly wholesalers also sold nationwide.

Concerning the anticompetitive effect

of Moore's termination, Moore officials testified that Moore charged the lowest prices in the country on the Lilly line, and that Moore's discounting caused other Lilly wholesalers to cut prices to meet the competition. However, there was testimony disputing the claim that Moore's prices were the lowest. The court did note that Manning admitted that if all Lilly wholesalers sold at or below the prices charged by Moore, there would be "some economic bruising taking place." Having thus reviewed the trial evidence, Judge Sweet concluded that the evidence of conspiracy was "very sketchy," that he would not have found Lilly guilty of an antitrust violation, but that the proof was "enough -albeit barely- to support the jury's verdict." Following a further evidentiary hearing, the district court granted Moore's request for an injunction, and ordered Lilly to

continue doing business with Moore.

Discussion

In considering Lilly's claim that the evidence was insufficient to support the jury verdict, we must determine, without weighing the credibility of the evidence but viewing it most favorably to the plaintiff, whether "there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice Par. 50.07[2] (2d ed. 1980); see also Beech Cinema v. Twentieth Century Fox Film, 622 F.2d 1106, 1107-08 (2d Cir. 1980). To do otherwise would be impermissibly to substitute our view of the evidence for that of the jury.

> "If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial."

Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1042 (2d Cir.), cert. denied, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976).

The court's role becomes especially crucial when, as here, the plaintiff's case is based solely on circumstantial evidence. Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 116 (3d Cir. 1980), cert. denied, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981).

[1] The central issue in this case is whether Moore was terminated pursuant to an illegal conspiracy between Lilly and one or more of its wholesalers to control resale prices and to restrict the territories in which Lilly products could be sold. (Compl. Par.24-26, 35, 39). A unilateral refusal by Lilly to deal with a wholesaler, absent proof that it was pursuant to a conspiracy, does not violate § 1 of the Sherman Act. United States v. Colgate & Co., 250 U.S. 300,

39 S.Ct. 465, 63 L.Ed. 992 (1919); Oreck Corp. v. Whirlpool Corp., 639 F.2d 75 (2d Cir. 1980). Moore could prevail only if it proved that its termination stemmed from "a contract, combination or conspiracy" between Lilly and certain of its wholesalers. Oreck, supra, at 79.

Conspiracies, of course, are rarely evidenced by explicit agreements, but must almost always be proved by "inferences that may fairly be drawn from the behavior of the alleged conspirators." Michelman v. Clark-Schwebel Fiber Glass Corp., supra, 534 F.2d at 1043. At a minimum, however, "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946).

[2-6] Although the evidence warranting an inference of concerted action will vary from case to case, courts have laid down fairly specific guidelines about what will be considered insufficient as a matter of law to warrant the inference of a conspiracy. Thus "[a] mere showing of close relations or frequent meetings between the alleged conspirators ... will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement." Oreck, supra, 639 F.2d at 79. Nor does a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with such other competing wholesalers, standing alone, support a finding of conspiracy with them. Id. at 80; Borger v. Yamaha Int'l Corp., 625 F.2d 390, 395 (2d Cir. 1980); Modern Home Institute v. Hartford Accident & Indemnity

Co., 513 F.2d 102 (2d Cir. 1975); Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105 (3d Cir. 1980), cert. denied, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them. Modern Home Institute v. Hartford, supra; Edward J. Sweeney & Sons v. Texaco, supra; A.G. Rogers Co. v. Merck & Co., 498 F.Supp. 5 (E.D.Tenn. 1980). Finally, the mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy. Beech Cinema, supra, 622 F.2d at 1109; Lamb's Patio Theatre, Inc. v. Universal Film Exchange, Inc., 582 F.2d 1068, 1070 & n.2 (7th Cir. 1978). Even if a manu-

facturer or supplier, acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration, this would not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract.

[7] With these principles in mind we consider whether the evidence here could reasonably support an inference that Moore was cut off pursuant to a conspiracy between Lilly and one or more of the other wholesalers to maintain resale prices and to restrict the territories within which Lilly products could be sold by wholesalers. Moore contends that the jury was entitled to infer such a conspiracy or an unlawful scheme from (1) proof that Lilly's invocation of the non-affiliation policy as the reason for the termination was a sham, (2) the "nail-in-the-box" memorandum, (3) the

Spectro meeting, coupled with wholesaler complaints about Moore, and (4) speculation that Lilly may have imposed territorial and price maintenance controls, based in part on Lilly's suggested retail price list. We disagree. The evidence, viewed separately or taken as a whole, was insufficient to permit a finding of the alleged conspiracy or unlawful scheme.

Lilly's Non-Affiliation Policy

The record is clear that Lilly did have a non-affiliation policy. The October 23, 1973, letter reaffirming the policy, the subsequent questionnaire Lilly sent to all its wholesalers inquiring about their adherence to the policy, the numerous references in the record to various attempts by Lilly to enforce the policy against other wholesalers, and the undisputed fact that Lilly conducted an investigation of the Big L stores to

determine whether there was a violation on Moore's part, all firmly establish that such a policy did in fact exist.

Moore, however, argues that the policy was not enforced stringently but on a highly selective basis, pointing to nine examples (out of some 367 Lilly wholesalers) where Moore claims the policy was not enforced. However, of these nine examples only five (Kiefer-Stewart Co., Kauffman-Lattimer Co., Jax Drugs, Newman Wholesale Drug, and Rogers Wholesalers Inc.) involved arguable violations of the non-affiliation policy; of these, three wholesalers divested themselves of their retailer affiliations, one has been notified by Lilly that its franchise will be terminated, and another has been determined not to involve an ownership interest

and is therefore not a violation.[6]

---

[6] In three instances, Kiefer-Stewart Co., Kauffman-Lattimer Co., and Jax Drugs, the wholesalers divested themselves of their retailer affiliations, although there was some conflicting testimony concerning the promptness with which Lilly sought to enforce its policy. Jax Drugs also leased space in its hospitals and nursing homes to independent retail pharmacists, but there was no question of any ownership interest involved.

Newman Wholesale Drug, which owns a retail pharmacy (Automated Pharmaceuticals, formerly Northeast Medical Suppliers, Inc., when it was owned by Parkway), was notified during the course of the trial below that it would be terminated. With respect to Rogers Wholesalers, Inc., the alleged affiliation consisted of the fact that a corporation that held some convertible preferred stock in Rogers also owned a retail pharmacy. Mr. Manning testified that Lilly's non-affiliation policy applied to ownership interests, which would not arise until the preferred stock was converted to common stock.

In three other instances, there was no evidence that the wholesalers as such owned or operated any retail pharmacies; the evidence only established that certain individuals who were involved with the wholesalers in various capacities had some very attenuated connections with retail operations as private individuals, as follows: (1) Four individual shareholders of Drug Guild Distributors were officers of retail pharmacies; (2) the son of the owner of D.A. Rosow Co. owned retail pharmacies; and (3) some members

(Footnote continued on next page)

Thus, even among the nine cases, Lilly enforced its policy when it suspected a violation. This hardly makes out a case of selective enforcement.

Moore counters that there were often substantial delays between Lilly's discovery of a suspected violation and the eventual divestiture by the wholesaler of its retailer affiliation. Yet typically these delays occurred in cases where wholesalers had promptly assured

---

(Footnote continued from preceding page) of the family that owned Lee and Osgood had loaned money to a friend who used it to purchase retail pharmacies.

Although there was some evidence that Sisson Drug operated a retail pharmacy shortly after WW II, there was no evidence that Lilly knew about this and Mr. Manning specifically denied any such knowledge.

More generally, the record showed that in some or all of these instances, it was the wholesalers themselves who brought to Lilly's attention the possible violations and then willingly negotiated with Lilly with a view to make alternative arrangements that would avoid violating Lilly's policy.

Lilly of their intention to divest or to search for alternative arrangements, and were involved in ongoing discussions with Lilly, which in part accounts for some of the delays.[7] In sharp contrast is Mr. Rome's declaration to Lilly in December 1975 that Moore had no intention of divesting. In view of the fact that Moore was the only wholesaler who had declared its intention to be "100 percent" in the retail bsuiness, which was "clearly in violation of [Lilly's] basic policy" (Tr.497-98), its termination does not provide a basis for the inference sought by Moore.

---

[7] For instance, Rogers Wholesalers, Inc., in response to Lilly's questionnaire sent to all Lilly wholesalers, indicated that it did have a retail affiliation in violation of Lilly's policy, and indicated its intention to divest. Subsequently, Rogers indicated in discussions with Lilly that its attorneys were attempting to solve the problem.

In any event, viewing the nine examples in the light most favorable to Moore, the most that the jury could permissibly infer was that Lilly had some reason other than its non-affiliation policy for terminating Moore. Indeed, Moore so argues, stating that "Lilly's use of a false reason for termination ... provides the inference that Lilly had another reason that it was concealing." Moore's Brief, p. 6. But such a pretext would not itself establish a conspiracy. The fact that Lilly may have had other reasons to terminate Moore makes it neither more nor less probably that Lilly acted in concert with others rather than unilaterally. As the Seventh Circuit stated in Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068, 1070 (7th Cir. 1978):

> "It is not enough, therefore, that Lamb's allege an inconsistency in Universal's course of dealings or

> that its business reasons for rejecting Lamb's bid were inaccurate. Absent a showing of conspiracy by Lamb's Universal had no obligation to produce any reasons for refusing to deal with Lamb's. Thus even if Lamb's could show that Universal's announced business reasons were not legitimate, such showing would not satisfy Lamb's burden of establishing the existence of the conspiracy element essential to its prima facie antitrust case. [Footnote omitted]."

The "Nail-in-the Box" Memorandum

We likewise conclude that the memorandum written by Lilly salesman Katz and attached to the article forwarded by wholesaler Rosow containing information about Moore's Big L affiliation fails to support an inference of a conspiracy. Even if Rosow's decision to forward the article to Lilly was motivated by Rosow's desire to pressure Lilly to terminate Moore, this alone is insufficient to establish concerted action. As the Court stated in Modern Home Institute, supra,

513 F.2d at 112:

> "A company's concern over the possible alienation of its agents is a legitimate basis for independent protective action on its part, which cannot be viewed as conspiratorial in the absence of some evidence of tacit understanding with competitors. Mere pressure by the agents themselves would not provide a basis for such an inference."

Moore claims that the existence of a conspiracy is evidenced by Lilly's "having [the Katz] memorandum prepared and by having it passed from level to level up the executive ladder." In the first place, this is an inaccurate characterization. The Katz memorandum was no more than a casual, handwritten note by one of over 1,200 Lilly salesmen who merely, in accordance with the salesman's normal procedure for handling wholesaler complaints, forwarded to his superior the trade publication article received from Rosow. The important item was the article, which contained financial data

relevant to Lilly's then current investigation of the Big L stores, not the salesman's covering memorandum. In any event, Lilly's treatment of Rosow's complaint as a serious matter would not give rise to an inference of a conspiracy.[8]

Moore argues that the Rosow complaint and the Katz memorandum take on heightened significance in the context of what Moore characterizes as a "flurry of complaints" lodged by wholesalers opposing Lilly's initial decision to sell to Moore in 1971. The record fails to support this claim, showing only that a single

---

[8] Complaints about the business practices of a competitor "would not indicate illegal concerted action, since it is merely normal marketplace behavior for such complaints to be made." Oreck Corp. v. Whirlpool Corp., 639 F.2d 75,80 (2d Cir. 1980).

wholesaler, Rosow, who was concededly displeased with Moore's presence in what it considered to be its trading area, had made a point of bringing to Lilly's attention any irregularities in Moore's operations.[9] This reflects Rosow's motives, but is not probative on the central issue of whether Lilly acted unilaterally or in concert with others.

Even if, as the trial court concluded -in our view inaccurate- the "note has some element of consensuality about it by virtue of its vivid language and its progress through the chain of command," it fails to support Moore's claim of conspiracy. While the note was written in May, 1974, Moore was not terminated

---

[9] Katz in his testimony used the phrase "flurry of complaints" to refer only to the fact that the several principals of D.A. Rosow complained to Lilly about Moore's inability "to service returns or correct mistakes." (Tr.278)

until April, 1976. The 1974 Katz memorandum and the Rosow article related only to Moore's affiliation with the Big L stores. Moore, however, was later terminated because of a completely different affiliation, its acquisition of the Mall Drug Stores, a chain of retail pharmacies which Moore did not acquire until 18 months after the Katz memorandum was written. Some time in 1974, after receiving the Katz memorandum, Lilly had completed its investigation of the Big L stores and concluded that Moore's connection with them did not violate the non-affiliation policy because they were not "retail pharmacies." The Katz memorandum does not therefore support the existence of a conspiracy two years later to terminate Moore.

Moore attempts to explain the time lag by arguing that Lilly could not use the Big L affiliation as a viable excuse

to terminate Moore in 1974 because Lilly had already known about it since 1971; therefore, the argument goes, "Lilly had to wait for a better excuse." Moore's Brief, p. 12. This theory is simply not supported by the evidence. Moore's factual premise is incorrect, as the record shows that Lilly became aware of the Big L stores only in late 1973 or early 1974. Moreover, if Lilly felt it could not viably terminate Moore because of its Big L affiliation since, according to Moore, it had been known to Lilly as early as 1971, there would have been no reason for Lilly in 1974 to conduct an investigation of the Big L stores, and no reason for Lilly to attach any significance to either the Rosow article or the Katz memorandum, which under Moore's theory merely contained information already known to Lilly for several years. Furthermore, if Lilly was so

eager to "find an excuse" to terminate Moore, it could have used Moore's affiliation with Northeast, which Moore apparently acquired after becoming a Lilly wholesaler in 1971. Yet, not only did Lilly fail to conduct an investigation of Northeast, but Manning, Lilly's executive in charge of wholesaler relations, testified that he completely overlooked the Northeast affiliation as a possible violation of Lilly's policy.

The only reasonable inference concerning the Katz memorandum and the events surrounding it is that Lilly received Rosow's complaint, considered the complaint in the process of its then ongoing investigation of the Big L stores, and unilaterally determined that Moore's affiliation with the Big L stores was not a violation of Lilly's non-affiliation policy. The evidence cannot reasonably support an inference of a conspiracy and,

in any event, there is no connection between the events in 1974 and Lilly's termination of Moore two years later.

The Spectro Meeting

The evidence concerning the Spectro meeting at most establishes that Lilly received a complaint from another of its wholesalers about Moore's violation of the non-affiliation policy, which does not justify an inference of a conspiracy in the absence of some evidence that Lilly and Spectro had expressly or impliedly agreed to terminate Moore in order to maintain resale prices and restrict wholesalers' sales territories. There is little dispute about the substance of the meeting, at which Spectro pointed out (as Lilly already knew) that Moore had recently acquired the Mall Drug Stores and asked if Lilly still adhered to its non-affiliation policy, to which Lilly responded that its policy was still in force and

that the matter was already under consideration and would be further investigated. All three witnesses who testified about the meeting denied that any agreement was reached that related in any way to Moore's termination.

The evidence is clear that Spectro routinely met with its suppliers at the annual NWDA meetings in order to conduct general business discussions, and that the meeting with the Lilly executives was one such meeting. While there was some inconsistency among the three witnesses' 1979 testimony concerning the particular details of the circumstances of a 1975 meeting, which is understandable, the evidence does not support Moore's claim that the meeting was a "secret, private 'summit'" requested by Spectro "in order to discuss Moore." Moore's Brief, pp. 14, 20. In Modern Home Institute, supra, we stated that even evidence of "pressure"

by complaint competitors cannot support an inference of a conspiracy. See also A.G. Rogers Co. v. Merck & Co., 498 F. Supp. 5, 7 (E.D.Tenn.1980). Where, as here, the evidence fails to reveal anything other than the receipt of a complaint by Spectro, it would be impermissible to allow the jury to speculate about the existence of a conspiracy.

Allegation of Scheme to Impose Territorial and Price Maintenance Controls

Moore argues that, even where a decision to terminate is unilaterally made, it may nevertheless constitute an antitrust violation if it was made as part of an overall scheme to maintain territorial and resale price controls, relying on Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); Simpson v. Union Oil of California, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964); United States v. Parke Davis & Co.,

362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); Jacobson & Co., Inc. v. Armstrong Cork Co., 416 F.Supp. 564 (S.D.N.Y.1976) aff'd, 548 F.2d 438 (2d Cir. 1977) (granting preliminary injunction preventing termination). We have summarized the holdings of the Supreme Court cases in the following way:

> "[A] manufacuturer or publisher may not enforce his announced resale prices by active coercion of those who purchase for resale, such as through threats of termination for non-compliance, whether made in combination with others or alone." Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975), cert. denied, 425 U.S. 936, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976) (citations omitted).

The evidence here simply does not support the existence of an overall scheme to control prices and territories. Although Lilly published a set of suggested retail prices, the record is devoid of any proof that Lilly sought to enforce these prices through active coer-

cion or any other means. On the contrary, the evidence reveals that the majority of Lilly items were being sold by Lilly wholesalers below the suggested retail prices, with no evidence of actual or threatened termination. In addition, Lilly does not restrict the territories where wholesalers may sell. Most Lilly wholesalers sell within a local area only because of natural limitations on the services they can provide. Some wholesalers, however, like Moore, sell their products nationwide. There is no evidence that either the "nail-in-the-box" memorandum or the Spectro meeting had anything to do with prices and territories; indeed, the evidence indicated that they only related to Moore's violation of the non-affiliation policy. Moore's contention must therefore be rejected.

Conclusion

We are fully aware of the principle that, although important items of circumstantial evidence considered separately may not justify an inference of combination or conspiracy, they may be sufficient when viewed together as part of one mosaic. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698-99, 82 S.Ct. 1404, 1409-10, 8 L.Ed.2d 777 (1962). However, in this case, even when the items relied upon by Moore are taken together and considered against the background and surrounding circumstances, they did not entitle the jury reasonably to infer the existence of a conspiracy. Any such inference would of necessity have had to be based on speculation.

Since the evidence was insufficient to support a finding of conspiracy or unlawful combination we need not consider whether Lilly's action was motivated by

anticompetitive reasons, since a unilateral decision to terminate, no matter what the reason, does not constitute a violation of the antitrust laws. Nor is it necessary to decide whether the district court erred in its instructions to the jury, in its grant of injunctive relief, or in its award of pre-judgment interest.

The judgment of the district court is reversed with directions, on remand, to enter a judgment dismissing the complaint. Costs are awarded to appellant.

APPENDIX E

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT, H.L. MOORE DRUG EXCHANGE, DIVISION OF/AND LEVITT INDUSTRIES, INC. v. ELI LILLY AND COMPANY (2d Cir. Dec. 30, 1981)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of December, one thousand nine hundred and eighty-one.

----------x

H.L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Plaintiff-Appellee,

-v- No. 81-7090

ELI LILLY AND COMPANY,

Defendant-Appellant.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, H.L. Moore

Drug Exchange, division of/and Levitt Industries, Inc.,

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

by Francis X. Gurdliest
Chief Deputy Clerk

APPENDIX F

JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT, H.L. MOORE DRUG EXCHANGE, DIVISION OF/AND LEVITT INDUSTRIES, INC. v. ELI LILLY AND COMPANY (2d Cir. Jan. 12, 1982)

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of October one thousand nine hundred and eighty-one.

Present:

HON. J. EDWARD LUMBARD

HON. WALTER R. MANSFIELD

HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

H.L. MOORE DRUG EXCHANGE, Division of/ and LEVITT INDUSTRIES, INC.,

Plaintiff-Appellee

v. #81-7090

ELI LILLY AND COMPANY,

Defendant-Appellant

U.S. DISTRICT COURT
FILED
JAN 12 1982
S.D. of N.Y.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings with costs to be taxed against the appellee, in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by Edward J. Guardaro
Deputy Clerk
1/12/82

By_____
Deputy Clerk
NO BILL OF COSTS OR STATEMENT ATTACHED.

Supreme Court, U.S.
FILED
JUL 19 1982
Alexander L. Stevas, Clerk

No. 81-2215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

H.L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioners,

vs.

ELI LILLY AND COMPANY,

Respondent.

MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, petitioners hereby move to defer consideration of their Petition for a Writ of Certiorari until the filing of the Petition for a Writ of Certiorari in Mendel Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir. 1982) ["Schwimmer v. Sony"].

1. The Petition for a Writ of Certiorari in this case was filed on May 28, 1982. Respondent's brief in opposition was filed on June 25, 1982.

2. Counsel for petitioners in this case also served as counsel for Appellee in Schwimmer v. Sony. Our firm will be filing a Petition for a Writ of Certiorari in that case no later than August 16, 1982. The petition is due on August 2, 1982, and Petitioner will be seeking an extension of no more than two weeks.

3. The primary reason for this motion is that the Schwimmer v. Sony decision involves many of the same issues raised in this case. Both petitions seek review of decisions by the United States Court of Appeals for the Second Circuit which reversed jury verdicts in favor of petitioners. Both involve findings of vertical conspiracies under Section 1 of the Sherman Act which were upheld by the District Court on motions for judgment n.o.v.

4. Schwimmer v. Sony and Moore v. Lilly are jointly considered a legal doctrine within the Second Circuit. That court upheld a grant of judgment n.o.v. on a tying claim and referred to these decisions as "two cases pointing to the correct decision in this case." Unijax, Inc. v. Champion Int'l, Inc., _____F.2d_____ (2d Cir. June 21, 1982).

5. The Schwimmer v. Sony case also conflicts with a line of cases in other circuits relating to the definition of "combination or conspiracy" under Section 1 of the Sherman Act. Because the Schwimmer v. Sony decision cites Moore v. Lilly in its legal analysis, we respectfully submit the two cases should be considered together. Both decisions also present an issue as to when an appellate court is required to remand a case for the district court's consideration of a new trial motion.

6. For the foregoing reasons, I respectfully request that the Court defer consideration of the Petition for a Writ of Certiorari in this case.

Dated: July 16, 1982

MILTON A. BASS
BASS, ULLMAN & LUSTIGMAN
Attorneys for Petitioners
747 Third Avenue
New York, New York 10017
(212) 751-9494

CERTIFICATE OF SERVICE

I, MILTON A. BASS, a member of the Bar of the Supreme Court of the United States and counsel of record for petitioners, hereby certify that on July 16, 1982, pursuant to Rule 28, Rules of the Supreme Court, I caused to be served one (1) copy of the foregoing Motion to Defer Consideration of Petition For a Writ of Certiorari on counsel for respondent herein by hand delivery to:

EDWARD SHERRY, Esq.
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10005

All parties required to be served have been served.

Dated: July 16, 1982

Milton A. Bass

Office - Supreme Ct.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioner,

- against -

ELI LILLY AND COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

EDWARD N. SHERRY,
Counsel of Record for Respondent,
Eli Lilly and Company,
140 Broadway,
New York, New York 10005
(212) 820-1280

Of Counsel:
JACK KAUFMANN
DAVID B. HOWORTH

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Brief in Opposition 1

ARGUMENT:

I: THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD IN REVIEWING THE EVIDENCE 4

II: THE COURT OF APPEALS WAS WITHIN ITS DISCRETION IN DENYING A NEW TRIAL 6

Conclusion 11

TABLE OF AUTHORITIES

CASES CITED:

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 5

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 4

Iacurci v. Lummus Co., 387 U.S. 86 (1967) 8,10

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967) 8-10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981
No. 81-2215

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioner,

- against -

ELI LILLY AND COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Six years ago the respondent, Eli Lilly and Company,* notified the petitioner, H.L. Moore Drug Exchange, that Lilly would not renew its distributorship

*Pursuant to Rule 28.1 of the Rules of this Court, respondent sets forth below the names of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the respondent, with their jurisdiction of organization in parentheses: Elanco Ihara K.K. (Japan); Dongyang Elanco Co., Ltd., (Korea); Albula, Cia. de Servicios Generales, S.A. (Spain); Lilly-Farma, Lda. (Portugal); Lilly Indiana de Espana, S.A. (Spain); Dista, S.A. Espanola (Spain); Elanco Veterinaria, S.A. (Spain); Sefri, S.A. (Spain); Elquiber, S.A. (Spain); Grima Quimica, S.A. (Spain); Elanco Quimica Cordobesa S.A. (Spain); Valquimica, S.A. (Spain); Controlpest Ambiental, S.A. (Spain); Controlpest Ecologica, S.A. (Spain); Elanco Agricola, S.A. (Spain); Elanco Premezclas, S.A. (Spain); Elardil, S.A. (Spain); Informet, S.A. (Spain); Elanco Industrial, S.A. (Spain); Quimel, S.A. (Argentina);

agreement with Moore because Moore's decision to acquire a chain of retail pharmacies was incompatible with Lilly's decades-old policy of selling its products only to wholesalers, and not directly to retail pharmacists or entities which conducted both wholesale and retail pharmacy businesses. Moore brought this suit, alleging that the reason given by Lilly was false and was contrived to conceal the real reason for the non-renewal, which, according to Moore, was rooted in a conspiracy among Lilly and its wholesalers to maintain resale prices and allocate territories among the wholesalers.

A jury verdict was returned for Moore, and Lilly moved for judgment n.o.v. In his decision on that motion, the district judge noted that "this court would not have found that Moore was terminated as a result of a conspiracy to restrict prices and territories." Appendix to petition ("App.") A-29. Nevertheless, he denied the motion, finding that Moore's evidence was "enough—albeit barely—to support the jury's verdict." App. A-40. Judgment was entered awarding damages to Moore and enjoining Lilly from ceasing to deal with Moore for a period of up to three years.

Lilly appealed from the judgment and the order denying the motion for judgment n.o.v. The court of appeals reversed and ordered that the complaint be dismissed, finding that the evidence was insufficient to support the verdict. Moore then petitioned for rehearing, with a suggestion of en banc consideration, arguing, inter alia, that evidence was erroneously excluded at trial and that the case should be remanded to permit Moore to

---

Biofar Insumos Quimico-Farmaceuticos, S.A. (Brazil); Japan Elanco Company, Limited (Japan); Shionogi Lilly Kabushiki Kaisha (Japan); CPI Cardiolab, S.A. (Argentina); CPI Espana, S.A. (Spain); Sociedad Anonima Espanola Elizabeth Arden (Spain); Commercial Arden, S.A. (Spain); Derly, S.A. (Spain); and Indisa, S.A. (Spain).

seek a new trial in the district court. That petition was denied. Moore now seeks a second appellate review from this Court.

In its attempt to obtain that second review, Moore mischaracterizes the holding of the court of appeals, misrepresents the record and argues for a rule of procedure that would prohibit a court of appeals from directing the entry of judgment when it reverses the denial of a defendant's motion for judgment notwithstanding the verdict. Despite Moore's attempts to create an issue worthy of this Court's consideration, the only issue presented by this case is whether its particular record facts were sufficient to support the jury's verdict. That is not an issue which this Court need consider, and the petition for certiorari should be denied.

ARGUMENT

I

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD IN REVIEWING THE EVIDENCE.

In an effort to create the appearance of a "certworthy" issue, Moore suggests that the Second Circuit interpreted *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), to require direct evidence to prove an antitrust conspiracy. Nothing in the Second Circuit's opinion supports the suggestion that the Second Circuit relied on *Continental T.V.* or required direct evidence to prove an antitrust conspiracy.

Continental T.V. is not even mentioned in the decision of the court of appeals. Nor was it mentioned in any of the briefs below, and with good reason: the issue in *Continental T.V.* was the reasonableness of unquestioned vertical restraints of trade, whereas in this case the sole issue has been the existence of any agreement to restrain trade. Lilly has never argued that any restraints it agreed to might have been reasonable; its argument has consistently been that the agreements in restraint of trade alleged by Moore simply did not exist. It cannot be seriously argued that *Continental T.V.* has any bearing whatever in this case.

Equally far afield is Moore's suggestion that the Second Circuit has imposed a direct evidence requirement to prove an antitrust conspiracy. To the contrary, the Second Circuit's opinion repeatedly affirms the relevance of circumstantial evidence in such cases:

> Conspiracies, of course, are rarely evidenced by explicit agreements, but must almost always be proved by "inferences that may fairly be drawn from the behavior of the alleged conspirators." *Mi-*

chelman v. Clark-Schwebel Fiber Glass Corp., supra, 534 F.2d at 1043.

App. A-77. And, again:

> We are fully aware of the principle that, although important items of circumstantial evidence considered separately may not justify an inference of combination or conspiracy, they may be sufficient when viewed together as part of one mosaic. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99, 82 S. Ct. 1404, 1409-10, 8 L. Ed. 2d 777 (1962). However, in this case, even when the items relied upon by Moore are taken together and considered against the background and surrounding circumstances, they did not entitle the jury reasonably to infer the existence of a conspiracy. Any such inference would of necessity have had to be based on speculation.

App. A-99.

Although Moore then discusses its interpretation of the record facts at length* in an effort to suggest that the Second Circuit applied the wrong standard in reviewing that record, Moore is, in reality arguing with the Second Circuit's conclusion that any inference of conspiracy in this case "would of necessity have had to be based on speculation." *Id.* Nothing in the Second Circuit's opinion suggests that it was doing anything other than what it said it was doing—applying the standard enunciated by this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962), and other

*Although Moore, in its effort to overcome that holding, has once again indulged in what the court of appeals referred to as "inaccurate characterization," App. A-88, we have refrained from a point-by-point rebuttal, since a brief in opposition to certiorari is not the proper occasion for such a rebuttal.

cases, for determining whether there is sufficient evidence of an antitrust conspiracy in this case.

The court of appeals, fully aware of the proper standard of review, carefully reviewed the record below and reached the correct result. In any event, its decision that the evidence in this particular case was not sufficient to support the verdict presents no federal question of such importance as to require the time and attention of this Court. Sup. Ct. Rule 17.

II

THE COURT OF APPEALS WAS WITHIN ITS DISCRETION IN DENYING A NEW TRIAL.

Moore phrases its second question presented as follows:

> Whether a Court of Appeals which reverses a verdict may deprive the verdict winner of a requested opportunity to make a new trial motion in the District Court?

Pet. i. Moore's implicit answer to that question is that a court of appeals does not have the power to direct the entry of judgment against an appellee; the court must instead remand to the district court to have it pass on any new trial motion that the losing appellee might desire to make. This position cannot be supported by logic or law.

Notwithstanding the position implicit in the question as presented, in its argument Moore contends merely that in *this* case, the Second Circuit's exercise of that power was an abuse of discretion. In doing so, Moore necessarily concedes that a court of appeals in fact has the power to direct the entry of judgment against an appellee.

Moore first raised its new trial arguments in its unsuccessful petition for rehearing in the court of appeals.

Its petition argued that the district court had erroneously excluded two items of evidence Moore considered helpful to its case.* Moore did not suggest in its petition for rehearing (nor does it suggest now) why it had any reason to hope that the new trial request would be favorably received by the trial judge, who, after all, had made the allegedly erroneous evidentiary rulings.

The petition for rehearing was denied without opinion. Only two reasons for the disposition suggest themselves: the court of appeals either considered that the

---

*These two items are the same ones discussed in Moore's petition. Pet. 23-24. The first was Mr. Moore's hearsay testimony that Mr. Katz (one of some 1200 Lilly salesmen) said to him "that I [Moore] am a thorn in the side of Lilly." (Trial transcript, p. 70.) In fact, the trial judge, under the erroneous impression that Mr. Katz had been speaking as an agent on a matter within the scope of his agency under Fed. R. Evid. 801(d)(2)(D), permitted the jury to hear this testimony. It was only after a recess during which the judge became aware of his misunderstanding that he instructed the jury to disregard that evidence. Contrary to Moore's representations, Mr. Moore did not testify that Mr. Katz or anyone else had said that Lilly had "a common understanding with complaining customers that Moore's discounting and interterritorial sales were a 'thorn' in Lilly's side." Pet. 23-24. Nor is there any support for Moore's statement that "[t]he district court's exclusion of this evidence was made, at least in part, in light of its summary judgment holding that there was otherwise enough evidence to support a jury inference of conspiracy." Pet. 24.

The other item of excluded evidence relates to an industrial spy who, at the instigation of a pharmaceutical manufacturer other than Lilly, obtained employment at Moore's warehouse in 1966. When Moore discovered the spy, it brought suit against 47 pharmaceutical manufacturers and wholesalers, including Lilly. That suit was settled between Lilly and Moore in 1971, five years before the events giving rise to this lawsuit occurred, with Lilly agreeing to accept Moore as an authorized wholesaler. Again, contrary to Moore's representations, Pet. 23 n.19, the district court did not rule that this evidence was relevant. To the contrary, the ruling was as follows:

> "THE COURT: I don't think Saviano [the industrial spy] cuts any ice.
> "MR. LUSTIGMAN: That a detective agency was hired?
> "THE COURT: No, I don't think that is relevant."

Trial transcript, p. 5.

trial judge's rulings were correct or considered that the excluded evidence, if admitted, would not have been sufficient, when taken together with other record evidence, to support a verdict against Lilly. According to Moore, the proper course for the court of appeals, regardless of its view on these evidentiary questions, was to remand to permit the trial judge to rule on the new trial motion. Presumably, if the trial judge adhered to his original evidentiary rulings, he would deny the motion, and, on appeal, the court of appeals could reach the conclusion Moore seeks to postpone. If, on the other hand, the trial judge granted the motion for a new trial—an unlikely event, given his statements below—the court of appeals, on the ensuing appeal, would once again reach the same conclusion on those evidentiary issues. Moore suggests no sound reason for requiring this procedural chutes-and-ladders game.

As this Court explicitly recognized in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), a final disposition by a court of appeals in these circumstances is entirely appropriate. The Court in *Neely* recognized that cases involving new trial requests made by a party, such as Moore, which has successfully resisted a motion for judgment n.o.v. in the district court only to lose on that issue in the court of appeals, would sometimes fall into a gray area where the new trial issue should more appropriately be resolved by the district court than by the court of appeals.* However, *Neely* also recognized that in some categories of cases the new trial

---

Iacurci v. Lummus Co., 387 U.S. 86 (1967), fell into that gray area and therefore can hardly be claimed to be "irreconcilable" with *Neely*, as Moore suggests. Pet. 27. The right to a new trial in *Iacurci* turned on the explanation for the jury's failure to follow the instructions contained in the special interrogatory submitted to it. Because no explanation was suggested by the record on appeal, the court of appeals was in a poorer position than the district court to evaluate the new trial issue.

issue may readily be decided in the court of appeals, and the Court specifically stated that one such category consisted of cases in which the erroneous exclusion of evidence is claimed as the basis for a new trial:

> [W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. [T]here remain important considerations which may entitle [the plaintiff-appellee] to a new trial. The erroneous exclusion of evidence which would have strengthened his case is an important possibility.[*] . . . But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court. Cf. *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574. . . . Final action on these issues normally rests with the court of appeals.

386 U.S. at 327-28.

In concluding its discussion of the new trial issue, Moore remarks that "[t]he Second Circuit appears to have adopted the practice of denying as a matter of course applications for a new trial when raised in petitions for rehearing." Pet. 27. Moore cites no evidence whatever of this supposed practice, but if Moore genuinely believes that this practice exists, it should not have

---

[*]Moore ends its quotation of this passage from *Neely* at this point, Pet. 25, leaving the erroneous impression that the Court did not go on to deal with the very question presented in Moore's petition.

waited until its petition for rehearing to raise the new trial issue. As the Court noted in *Neely*:

> [T]he appellee can choose for his own convenience when to make his case for a new trial: he may bring his grounds for new trial to the trial judge's attention when defendant first makes an *n.o.v.* motion, he may argue this question in his brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed.

386 U.S. at 328-29.

Petitioner's second question presented raises no issue worthy of certiorari. *Neely* not only authorizes, but encourages, courts of appeals to resolve new trial requests based on the exclusion of evidence, and neither *Iacurci* nor any other case since *Neely* is inconsistent with it.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD N. SHERRY
Counsel of Record for Respondent,
Eli Lilly and Company,
140 Broadway,
New York, New York 10005
(212) 820-1280

Of Counsel:

Jack Kaufmann
David B. Howorth

June 25, 1982

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that on this 25th day of June, 1982, pursuant to Rule 28.3 of the Rules of this Court, three copies of the Brief in Opposition were mailed, first-class postage prepaid, to Milton A. Bass, counsel of record for petitioner H. L. Moore Drug Exchange, at the firm of Bass, Ullman & Lustigman, 747 Third Avenue, New York, New York 10017. I further certify that all parties required to be served have been served.

Edward N. Sherry
140 Broadway
New York, New York 10005

Office - Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioners,

vs.

ELI LILLY AND COMPANY,

Respondent.

OPPOSITION TO MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

By the present motion, petitioner H. L. Moore Drug Exchange ("Moore") seeks to have this Court defer consideration of Moore's Petition for a Writ of Certiorari, which was filed on May 25, 1982. Respondent Eli Lilly and Company ("Lilly") filed its brief in opposition on June 28, 1982.

The Petition for Certiorari seeks review of a decision by the Court of Appeals for the Second Circuit filed in the above action on October 16, 1981 reversing a jury verdict in Moore's favor and vacating an injunction compelling Lilly to continue doing business with Moore. Because Moore filed a motion for reargument and a suggestion for rehearing en banc in the Second Circuit, the injunction originally issued by the District Court remained in effect until after the Second Circuit denied Moore's request for rehearing and rehearing en banc on December 30, 1981, and Moore's original time to file its Petition for Certiorari did not expire until March 29, 1982.

Moore then sought and received from this Court two extensions of time to file its Petition for Certiorari, resulting in a maximum extension of 60 days until May 28, 1982. Moore now seeks deferral of consideration of its Petition until at least mid-September, 1982, assuming a Petition for Certiorari is filed in Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir. 1982) on August 16, 1982, as counsel asserts it will do, and Sony files a brief in opposition in 30 days. If, of course, either party in Schwimmer seeks a further extension, Moore's request for a deferral in this action would result in a further delay of consideration of Moore's Petition.

In making the present motion, Moore fails to note that it is concurrently seeking a writ of injunction in this action from the Court of Appeals for the Second Circuit under the All Writs Statute, 28 U.S.C. § 1651. The injunction sought would require Lilly, which was granted judgment dismissing the complaint in the Court of Appeals, to continue doing business with Moore until this Court disposes of the case. Although Lilly does not believe the motion for an injunction should be granted, if it is, the instant motion for deferral would only prejudice Lilly by further delaying the time when Lilly would be free to cease doing business with Moore, notwithstanding the Second Circuit's decision that it was free to do so last October, over nine months ago.

Supreme Court Rule 19.4 provides a procedure for seeking joint review of cases which a petitioner considers to be related. Moore has offered no reason for its failure to comply with this Rule. The Schwimmer case was decided on May 3, 1982, almost four weeks before Moore filed its Petition for Certiorari in this case. Moore sought and received an extension of time to file its Petition for Certiorari in

this case for the avowed purpose of treating the Second Circuit's decision in Schwimmer simultaneously. In fact, the Petition for Certiorari in this case cites and discusses the Schwimmer decision. Had Moore, whose counsel also represents the losing plaintiff in Schwimmer, followed the procedure set out in Rule 19.4, instead of pursuing its present tactical course, there would have been no potential for prejudicial delay to Lilly. Moore should not now be rewarded for flouting the procedures provided for by the Rules of this Court.

Finally, in its motion for deferral, Moore argues that the Schwimmer case is in conflict with cases in other circuits. In contrast, the Petition for Certiorari in this case makes no such claim, nor could such a claim have been made. The only justification put forward in Moore's motion for giving joint treatment to the instant case and Schwimmer is "[b]ecause the Schwimmer v. Sony decision cites Moore v. Lilly." That is a wholly inadequate reason to defer the resolution of this case, and Lilly respectfully requests that Moore's motion be denied.

Dated: July 21, 1982

Edward N. Sherry
by David B. Hearth

EDWARD N. SHERRY
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys for Respondent
140 Broadway
New York, New York 10005
(212) 820-1100

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID B. HOWORTH, being duly sworn, deposes and says:

1. On July 23, 1982, pursuant to Rule 28.3 of the Supreme Court, I served one copy of the foregoing Opposition to Motion to Defer Consideration of Petition for a Writ of Certiorari on counsel for petitioner herein by depositing it in a United States mailbox, with first class postage prepaid, addressed to: Milton A. Bass, Esq., Bass, Ullman & Lustigman, 747 Third Avenue, New York, New York 10017.

2. All parties required to be served have been served.

David B. Howorth

Sworn to before me this
23rd day of July, 1982

Notary Public

DAVID A. RUSO
Notary Public, State of New York
No. 31-4782243
Qualified in New York County
Commission Expires March 30, 1984